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IN THE

Supreme Court of the United States

October Term, 1974

ROMAN GRIBBS, Mayor of the City of Detroit, et al., Petitioners,

v.

AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation, Respondents.

— — —

ROMAN GRIBBS, Mayor of the City of Detroit, et al., Petitioners,

v.

NORTOWN THEATRE, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Mayor of the City of Detroit and the other named Petitioners, by and through their attorneys, KERMIT G. BAILER, Corporation Counsel of the City of Detroit, MAUREEN P. REILLY, JOHN E. CROSS and VICTOR G. MARROCCO, Assistants Corporation Counsel, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in the captioned cases.

OPINIONS BELOW

The opinion of the Court of Appeals (App A, pp 15-39 is not reported. The opinion of the District Court (App. D, pp 43-60) is reported at 373 F Supp 363.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App. B, pp. 40-41) was entered on June 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a compelling state interest exists which requires regulation of businesses which offer for sale or exhibition "adult" material.

2. Whether the zoning and licensing regulations affecting "adult" businesses bear a reasonable relation to the legitimate governmental purpose sought to be achieved.

3. Whether the provisions of the new zoning and licensing laws affecting "adult" businesses are clearly defined with narrow specificity and are directed only against those businesses which, in the interest of the general welfare, must be regulated.

4. Whether the provisions of the new zoning and licensing laws affecting "adult businesses" provide procedural due process which do not operate as a prior restraint on the exercise of Respondents' rights under the First and Fourteenth Amendments to the U. S. Constitution.

STATUTES AND ORDINANCES INVOLVED

The legislative body of the City of Detroit is authorized to divide the City into zoning districts, and to regulate and restrict the location of trades therein, by virtue of the authority granted by the Zoning Enabling Act, 1921 PA 207 (MCLA 125.581) which provides:

> "The legislative body of cities and villages may regulate and restrict the location of trades and industries and the location of buildings designed for specified uses and for such purposes divide any city or village into districts of such number, shape and area as may be deemed best suited to carry out the provisions of this section. For each of such districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades and industries that shall be permitted or excluded or subjected to special regulations. Such *regulations shall be made* in accordance with a plan designed to lessen congestion on the public streets, to promote public health, safety and general welfare, and shall be made *with reasonable consideration,* among other things, *to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development.*" (Emphasis added.)

By virtue of that authority, the Detroit City Council enacted several amendments to its Official Zoning Ordinance, which defined certain "adult" businesses, and designated them as "regulated uses". These amendments were

incorporated into Ordinance 742-G, (App. G, pp. 65-79). Section 66.0100 of the Official Zoning Ordinance was not amended, but is inserted here for clarification in reading the amendments incorporated in 742-G. Section 66.0100 provides:

> "Application to establish any of the above regulated uses shall be made to the City Plan Commission, who shall not approve such request if there is already in existence two or more such regulated uses within 1,000 feet of the boundaries of the site of the proposed regulated use, excepting as provided for in Sec. 66.0101."

By Ordinance 743-G, the Detroit City Council amended Chapter 5, Article 2 of the Municipal Code to include within the provisions affecting public entertainment generally, coin-operated motion picture devices, adult motion picture theatres, adult mini motion picture theatres, drive-in theatres and concert halls. The pertinent licensing provisions of Ordinance 743-G are printed in the Appendix at pp. 80-84).

STATEMENT

In 1969, there were located within the City of Detroit, two "adult" bookstores, two "adult" theatres, and an insignificant number of "topless" cabarets. By mid-1972 the number of "adult" theatres had increased to eighteen, "adult" bookstores had increased to twenty-one, and "topless" cabarets numbered approximately seventy. Reports submitted to the Detroit City Council by the Police Department indicated that many of these "adult" businesses were clustering on main streets of the City (and Highland Park, a city within the City of Detroit), which were immediately adjacent to residential neighborhoods. Acting upon complaints of such neighborhood residents, the City Council enacted Ordinance 742-G, *supra*, amending the Official Zoning Ordinance by including "adult" theatres and bookstores, and Class "D" (topless) cabarets in the category of "regulated uses." "Regulated uses" were those uses determined from experience to have a deleterious effect on a neighborhood, and included taxi dance halls, bars, motels, pawnshops, etc. (Sec. 66.0000). Such uses were restricted in their location, i.e., no more than two "regulated uses" were to be permitted within 1,000 feet of each other. This prohibition could be waived by the City Plan Commission upon a showing that the proposed location of the "regulated use" would not be injurious to the surrounding area. (Sec. 66.0101.)

In addition, Sec. 66.0103 of the Ordinance prohibited the location of an "adult" business within five hundred feet of a residential unit unless the prohibition was waived by the consent of fifty-one percent of the persons living or doing business within five hundred feet of the proposed location.[1]

Ordinance 743-G amended the Municipal Code to include "adult" theatres under Chapter 5, Article 2, entitled "Public Entertainment Generally" and required that they be licensed by the City.

---

[1] The District Court ruled that this provision was unconstitutional as it was more restrictive than necessary to achieve the City's legitimate governmental purpose. The Court stated that the ordinance, as written, protected a *single* residential unit, when the City continually asserted its purpose in enacting the ordinance was the protection of *neighborhoods*. In order to correct the "defect" noted by the District Court, the City amended Sec. 66.0103 to prohibit the location of "adult" businesses within five hundred feet of a "residentially zoned district." (See Ordinance 891-G, App I, pp 84-92.)

Subsequent to the enactment of the above described ordinances on November 2, 1972, the Respondent Nortown Theatre, Inc. began exhibiting films which were "adult", as defined in Sec. 32.0007 (App. G, at pp. 65-68) in an established theatre which was within 1,000 feet of several other regulated uses and within five hundred feet of a residential area. The Respondents American Mini Theatre, Inc. and Pussy Cat Theatres, Inc., converted a corner gas station to a mini theatre and offered similar "adult" fare for exhibition. The newly renovated theatre was within 1,000 feet of two other regulated uses and within five hundred feet of a residential area. The Respondents were notified by the Petitioners of the City's intention to enjoin their operation under the State Zoning Enabling Act and the City zoning ordinances.

In the spring of 1973, following such notification, the Respondents claimed their constitutional rights under the First, Fifth, and Fourteenth Amendments were threatened by the proposed action of the various City officials, and sought declaratory and injunctive relief in the Federal District Court, Eastern District of Michigan, under 42 USC 1983. The jurisdiction of the Court was invoked under 28 USC 1331 and 28 USC 1343 (3).

The District Court consolidated the cases for argument and, on March 22, 1974, issued a joint opinion which recognized the City's legitimate governmental purpose, and upheld the validity of the challenged ordinances with the exception noted in Footnote 1 above. (App. D, pp. 43-60). Judgment was entered in the *Nortown* case on April 25, 1974 (App. E, at p. 64) and in the *American Mini Theatres* case on May 20, 1974 (App. F, p. 63). Respondents appealed the decision to the Sixth Circuit Court of Appeals. On June 16, 1975, the Appellate Court, in a two to one decision,

ruled that the ordinances were unconstitutional as they related to "adult" material, presumably protected by the First Amendment, in a different manner than other protected material, solely on the basis of content. (App. A, pp. 15-39). Judgment was entered the same day. (App. B, p. 40).

On July 18, 1975, a Stay of Mandate was issued by the Hons. Edwards, Celebrezze and Lively, the panel which decided the case in the Court of Appeals. (App. C, p. 42).

REASONS FOR GRANTING THE WRIT

The Court of Appeals of the Sixth Circuit, by a two to one decision, has ruled that the zoning and licensing ordinances enacted by the City of Detroit to control the proliferation of "adult" businesses within the City are unconstitutional, as they are violative of the equal protection clause of the Fourteenth Amendment. The basis for this ruling, apparently, is that "adult" businesses which offer for exhibition or sale "adult" material, presumably protected by the First Amendment, cannot be treated in a different manner than other similar businesses offering "non-adult" material, solely on the basis of the content of the material offered for sale or exhibition.

The ruling by the Court of Appeals decides an important issue of federal law which has not been, but should be, settled by this Honorable Court. As pointed out by the Honorable Anthony J. Celebrezze, in his strong dissenting opinion, the majority ruling of the Court of Appeals that the cities may not regulate, by narrowly drawn licensing and zoning ordinances, those businesses which have been shown to have a deleterious effect on the surrounding resi-

dential neighborhoods and the other businesses which serve the neighborhood families, is contrary to applicable rulings of this Honorable Court.

The decision of the Court of Appeals invalidating Ordinances 742-G and 743-G as a denial of equal protection, was based primarily upon *Police Department of Chicago v. Moseley,* 408 US 92 (1972). That case invalidated an ordinance which prohibited all picketing within 100 feet of any school building during classes except "the peaceful picketing of any school involved in a labor dispute." The U. S. Supreme Court could find *no rational basis* for the distinction between "all other peaceful picketing" and "peaceful picketing involving a labor dispute." There was no showing that the ill effects on the schools caused by "all other peaceful picketing" were different from the ill effects of "peaceful picketing involved in a labor dispute." The case is distinguishable from the case at bar because Petitioners have made a showing that the deleterious effects on a neighborhood are caused, not by all theatres and bookstores, but only those of an "adult" nature. The separate classification and treatment of "adult" theatres and bookstores is necessary not because the contents of the material disseminated in "adult" bookstores and theatres is different, but because of the ill effects on the neighborhood caused by the establishment and operation of those businesses, which effects are not caused by "non-adult" businesses.

As stated by the Honorable Celebrezze in his dissent (page 21):

> "The ordinance goes out of its way not to bar these businesses from a convenient market. Its purpose is, rather, to prevent the breakdown of neighborhoods caused by undue concentrations of these businesses. If non-adult bookstores and theatres contributed to neighborhood blight in the same way

> that adult businesses do, the City would, no doubt, include them as designated uses under the ordinance, just as shoe-shine parlors and bars are included. It is not a control on the basis of content in which the City of Detroit is engaging. It is, instead, a justifiable distinction in neighborhood impact that underlies the differential treatment between adult and non-adult businesses. This amply distinguishes our case from *Moseley,* where the City was unable to justify a differential treatment of peaceful labor picketing and peaceful non-labor picketing. The only conceivable reason for the difference in *Moseley* was that the City sought 'to restrict expression because of its message, its ideas, it subject matter, or its content'. *Moseley,* 408 US at 95. That is not the purpose of Detroit's ordinance."

The United States Supreme Court has recognized that a classification may be based on the content of the material regulated, if the ill effects caused by the expression of particular ideas in a particular manner, in a particular place, warrant remedial legislation and the regultion is not total prohibition. *Grayned v. City of Rockford,* 408 US 104, 115 (1972); *Cox v. Louisiana,* 379 US 559, *Rehearing Den.* 380 US 926 (1965); *Cox v. New Hampshire,* 312 US 569 (1941). The challenged city ordinances regulate the *location* of adult businesses, but do not prohibit them, nor censor the content once the business has been established.

The Court of Appeals noted, and apparently has determined that "although the application of the ordinances is confined to 'adult' forms of entertainment, they are not designed to protect minors from harmful influences." The brief and affidavit submitted by Petitioners refute this

contention as they repeatedly emphasize the necessity of protecting and preserving the residential areas of the City and the business districts which serve them. Ordinances seeking to protect and preserve residential zoning districts have always been enacted with the intent of providing a suitable atmosphere for family living, and a suitable atmosphere to raise children. This basic principle of zoning residential areas to provide for *family* needs has been consistently recognized by our courts, most recently in *Berman v. Parker*, 348 US 26 (1945) and *Village of Belle Terre v. Boraas*, 416 US 1 (1974) where a zoning ordinance was recognized as:

> " . . . economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the equal protection clause if the law be 'reasonable, not arbitrary,' (citation omitted) and bears 'a rational relationship to a (permissible) state objective.'...
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

The Court of Appeals has applied the test in *U.S. v. O'Brien*, 391 US 367 (1968) and found the city ordinances wanting. Petitioners respectfully submit that the dissenting opinion of the Honorable Celebrezze is a correct interpretation of the O'Brien test and, thus interpreted and applied, the city ordinances should be upheld.

The limited effect of the ordinances on "adult" businesses only was intentional to avoid a claim of overbreadth which would surely be made if the regulations were enacted with respect to all theatres and bookstores. The regulations were purposely limited to "adult" theatres and bookstores because they are the cause of the adverse effects on neighborhoods, which adverse effects provide the compelling state interest required in order to support a regulation of the dissemination of First Amendment material. *Grayned v. Rockford, supra; Cox v. New Hampshire, supra.*

The "solutions" posed by the Court of Appeals are not solutions, as they would be overbroad, and would require families to resort to clusters of adult businesses if they wish to attend a movie at all. As the Honorable Celebrezze stated, "indeed, the . . . . suggested solution would accomplish precisely what Detroit seeks to prevent." It is respectfully submitted that the ordinances were narrowly drawn in the most limited manner possible to accomplish the legitimate governmental purpose sought to be achieved.

Unless this Honorable Court grants Petitioners' request for ceritorari, the City of Detroit will be unable to effectively forestall any theatre in the City of Detroit from exhibiting any film of "adult" nature as defined by Ordinance 742-G, or prohibit the establishment of "adult" book sections in every bookstore, grocery store or drugstore in the City of Detroit, or curtail the number of new "adult" theatres or bookstores which may be opened in virtually every business district in the City, regardless of their proximity to a residential neighborhood.

The City's anti-pornography ordinance is effective only on a piecemeal, item by item basis, but enforcement of the ordinance against apparent pornagraphy in lengthy trials

and appeals does not close down the "adult" businesses, nor does it preserve the neighborhood.

Further, if the interpretation of the Court of Appeals' decision is that it invalidates Ordinance 742-G as it regulates Class "D" cabarets, there would be no effective means of curtailing the six hundred fifty-three cabarets licensed to provide entertainment in the City of Detroit from providing "topless" entertainment along with the seventy Class "D" cabarets already licensed for such entertainment, regardless of their location in the City of Detroit. This interpretation is clearly contrary to this Honorable Court's decision in *California v. LaRue*, 93 S Ct 390, 409 US 109, 34 L Ed 2d 342 (1972); and to *Crownover v. Musick*, 509 Pac 2d 497, *cert den* 39 L Ed 2d 489 (Cal. 1974).

It should also be emphasized here that several other cities throughout the United States, who have adopted similar regulatory measures using the Detroit ordinances as a model, will likewise be faced with an inability to effectively deal with "adult" businesses in their communities.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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By: /s/ Maureen P. Reilly

Dated: July, 1975.

APPENDIX A

OPINION OF THE COURT

Decided and Filed June 16, 1975.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

74-2129 American Mini Theatres, Inc., a Michigan corporation and Pussy Cat Theatres of Michigan, Inc., a Michigan corporation, Plaintiffs-Appellants, v. Roman Gribbs, Mayor of the City of Detroit, et al., Defendants-Appellees. — — — — — — — — — — — — 74-2303 Nortown Theatre, Inc., Plaintiff-Appellant, v. Roman Gribbs, Mayor of the City of Detroit, et al., Defendants-Appellees.	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Before: Edwards, Celebrezze and Lively, Circuit Judges.

Lively, Circuit Judge, delivered the opinion of the Court in which Edwards, Circuit Judge, joined. Celebrezze, Circuit Judge, (pp. 15-23) filed a separate dissenting opinion.

Lively, Circuit Judge. This case deals with a city zoning ordinance which classifies and regulates "adult" movie theatres and bookstores solely on the basis of the content of the materials which they purvey. Except for one feature the zoning ordinance and a related code amendment were held valid by the district court as against charges that they violate the First and Fourteenth Amendments to the Constitution. We reverse.

In 1962 the City of Detroit adopted an Official Zoning Ordinance which contained a finding that concentrations of certain types of businesses tended to have a deleterious effect upon the neighborhoods in which such concentrations took place. By section 66.0000 of that ordinance it was provided that not more than one of any such businesses might be placed within 1,000 feet of any other business establishment of a kind listed in the section. The businesses thus regulated were bars, transient hotels, poolrooms and similar establishments found in "skid row" areas of many cities. Whereas the purpose of most zoning ordinances is to establish separate zones for various uses and to confine such uses to those zones, thus segregating specified uses of land from each other and concentrating each use or class of uses into defined zones, Detroit adopted the theory of "inverse zoning" by which certain land uses were prohibited from concentrating and were required to maintain minimum distances from each other. Of course, all of the uses thus regulated were also subject to the general zoning features of the ordinance which limited them to commercial and industrial zones.

Prior to 1972 the authorities noted the emergence of clusters of "adult" movie theatres and bookstores together with topless bars and "go go" establishments in certain areas of the City. In an attempt to control these concentrations of adult-type entertainment, the City adopted a series of amendments to the Official Zoning Ordinance and

the City Code by ordinance #742-G and #743-G, both of which were made effective November 2, 1972. Ordinance #742-G, *inter alia*, added new sections 32.0007, 66.0000 and 66.0103, which are reproduced in part as follows:

> Section 32.0007 Adult:
>
> Adult Book Store
>
> An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.
>
> Adult Motion Picture Theater
>
> An enclosed building with a capacity of 50 or more persons used for presenting material having as a dom- [sic] presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below) for observation by patrons therein.
>
> Adult Mini Motion Picture Theater
>
> An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), for observation by patrons therein.
>
> For the purpose of this Section, "Specified Sexual Activities" is defined as:

1. Human Genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

And "Specified Anatomical Areas" is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Section 32.0023 Cabaret.

Group "D" Cabaret

A cabaret which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers.

66.0000 Regulated Uses

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e. not more than two such uses within one thousand feet of each other which would create such adverse effects). Uses subject to these controls are as follows:

Adult

Adult Book Store

Adult Motion Picture Theater

Adult Mini Motion Picture Theater

Cabaret

Group "D" Cabaret

Establishment for the sale of beer or intoxicating liquor for consumption on the premises.

Hotels or motels

Pawnshops

Pool or billiard halls

Public lodging houses

Secondhand stores

Shoeshine parlors

Taxi dance halls

Section 66.0103

It shall be unlawful to hereafter establish any Adult Book Store, Adult Motion Picture Theater, Adult Mini Theater or Class "D" Cabaret within 500 feet of any building containing a residential, dwelling or rooming unit. This prohibition may be waived if the person applying for the waiver shall file with the City Plan Commission a petition which indicates approval of the

> proposed regulated use by 51 per cent of the persons owning, residing or doing business within a radius of 500 feet of the location of the proposed use, the petitioner shall attempt to contact all eligible locations within this radius, and must maintain a list of all addresses at which no contact was made.

Ordinance #743-G, an amendment to the Code of the City of Detroit, provides in part:

> It shall be unlawful for any person to hereafter operate an Adult Motion Picture Theater, Adult Mini Motion Picture Theater or Drive-in Theater until he shall have complied with the requirements of the Official Zoning Ordinance, the provisions of this article and other applicable ordinances of the City of Detroit.

This ordinance contains definitions of adult motion picture theatre, by reference to "Specified Sexual Activities" or "Specified Anatomical Areas," using the same language as contained in ordinance 742-G. In addition to specifying the license fees for each of the defined establishments, the ordinance contains the following provision:

> The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already issued upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this city regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby.

The plaintiffs-appellants are lessees and operators of "adult" motion picture theatres in the City of Detroit which are directly affected by the two ordinances in question.

The Supreme Court held in *Euclid* v. *Ambler Co.*, 272 U.S. 365 (1926), that zoning ordinances which classify property by the uses to which it is put and regulate such uses are a proper exercise of the police power. Noting the shift of population in this country to the cities, the Court reasoned that problems connected with police and fire protection, sanitation disposal and other traditional municipal services could be reduced by requiring that various areas of a city be set aside for certain uses and that incompatible uses be prohibited therein. The Euclid zoning ordinance was claimed to be an unreasonable and confiscatory regulation in the guise of exercise of the police power, but the Court held that such laws result from a legitimate exercise of the police power in furtherance of the general welfare and that the legislative judgment must control in setting the classifications and defining the zones. *Id.* at 388. More recently in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), the Supreme Court upheld the validity of a zoning provision which limited a residential area to one-family dwellings and defined the word "family" as "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family." *Id.* at 2. The Court found that the ordinance affected no fundamental rights guaranteed by the Constitution and therefore applied the "rationale relationship" test to the claim that the ordinance violated the equal protection clause of the Fourteenth Amendment. In dissent, Mr. Justice Marshall

stated that the ordinance affected the plaintiffs' "fundamental rights of association and privacy guranteed by the First and Fourteenth Amendments." *Id.* at 13. Thus he would have applied the stricter "compelling interest" test and held the ordinance invalid.

There appears to be no disagreement that the power of a municipality to regulate land uses, however desirable and important the goal may be, cannot be achieved by means of laws which deprive affected persons of their constitutional rights. This was the holding in *Buchanan* v. *Warley,* 245 U.S. 60 (1917), where the Court struck down an ordinance of the City of Louisville which provided that a person of one race could not move into and occupy property in a block where the majority of houses were already occupied by persons of a different race. The Supreme Court did not question the City's claim that the purpose of the ordinance was to promote public peace and prevent conflict and ill will, but held that "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Id.* at 81. Further, in upholding a comprehensive land use plan for the District of Columbia, the Supreme Court noted in *Berman* v. *Parker,* 348 U.S. 26, 32 (1954), that although matters of this kind are within the police power of a community, the wide latitude in classifying and limiting property uses which is the province of the legislature is "[s]ubject to specified constitutional limitations."

In its brief and oral argument the City of Detroit recognizes that it is regulating matter presumably protected by the First Amendment, but maintains that the ordinances contain no absolute prohibition against dissemination of the First Amendment materials and that the degree of regulation exercised here is permissible under standards enunciated by the Supreme Court. The City filed a number of affidavits by persons trained in the social sciences and ex-

perts in real estate values to show that concentrations of adult-type bookstores and theatres would destroy the neighborhood values of the areas in which these concentrations took place. While counter affidavits filed by plaintiffs took issue with the claims that actual property values had declined in areas where these concentrations had taken place, there was nothing offered by the plaintiffs to dispute the statements concerning the decline in "quality of life" and the increase in problems associated with police and fire protection and sanitation brought about by such concentrations. The City of Detroit has demonstrated a compelling and legitimate interest in preserving neighborhood values, aesthetic and social as well as economic. The question is whether ordinances 742-G and 743-G constitute a permissible means of achieving this end.

The City maintains that these ordinances represent the only reasonable means of restricting the numbers of regulated uses which may be located in any neighborhood. It is argued that the choice of methods is left to the legislative body of the City, and that it has chosen a method which only indirectly affects the right of free expression guaranteed by the First Amendment. The City relies principally on *United States* v. *O'Brien,* 391 U.S. 367 (1968), which upheld a statute making it illegal to mutilate or destroy a draft card. The Court in *O'Brien* noted that the statute clearly did not abridge free speech on its face and stated that in dealing with conduct containing both "speech" and "nonspeech" elements, ". . . we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the

furtherance of that interest." *Id.* at 377. After discussing the important governmental interest involved in orderly administration of the selective service system, the Court concluded that any effect which the statute had on the right of free speech was incidental and that the defendant had been convicted solely for the "noncommunicative impact of his conduct. . . ." *Id.* at 382. Then, as if to make clear the limits of its holding, the Court speaking through Mr. Chief Justice Warren, stated,

> The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg* v. *California,* 283 U. S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, *NLRB* v. *Fruit & Vegetable Packers Union,* 377 U. S. 58, 79 (1964) (concurring opinion).
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> 391 U.S. at 382.

The appellants argue that the two ordinances in the present case are unconstitutional in that they directly impair the right of free expression guaranteed by the First Amendment; that they violate the due process clause of the Fourteenth Amendment in that they are both vague and overbroad; that they fail to provide proper procedural safeguards to those affected by their provisions; and that they violate the equal protection clause of the Fourteenth Amendment. We reject the argument that the real purpose of the ordinances is to bypass the require-

ments for criminal prosecution of persons disseminating obscene materials and to effect this end indirectly by means of zoning and licensing regulations. We are bound by the legislative statement of the purpose of these acts and note that in *United States* v. *O'Brien, supra,* the Court held that it is only the effect of legislation which is important in considering a constitutional challenge, not its purpose. Therefore, regardless of the purpose of the legislation, if its effect is to establish a means by which undesirable films and books which have not been declared obscene may be regulated in a way which makes resort to criminal laws dealing with obscenity largely unnecessary, the device is subject to close scrutiny. See *Bantam Books* v. *Sullivan,* 372 U.S. 58, 69 (1963). We also note that although the application of the ordinances is confined to "adult" forms of entertainment, they are not designed to protect minors from harmful influences. Compare *Ginsberg* v. *New York,* 390 U.S. 629 (1968).

There can be no doubt that movies, though they may be intended primarily for entertainment and are produced for profit, are a form of expression protected by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501 (1952); *Freedman* v. *Maryland,* 380 U.S. 51 (1965); *Interstate Circuit* v. *Dallas,* 390 U.S. 676, 682 (1968). Each of the cases just cited dealt with statutes and ordinances which were found to violate the due process guarantees of the Fourteenth Amendment, either because of vagueness or overbreadth or failure to provide for speedy judicial determination of the validity of the particular restraint applied. Believing as we do that the two ordinances under consideration in this case are invalid under the equal protection clause of the Fourteenth Amendment, we will pass to a discussion of that issue without dwelling on the due process challenges.

In *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), a poll tax case, the Supreme Court stated: "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." (Citations omitted.) 383 U.S. at 670. To be valid a statutory classification which affects fundamental freedoms must be necessary to the achievement of a compelling state interest and not just rationally related to a valid public purpose. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Since the materials to be exhibited in the theatres of appellants have not been judicially declared obscene under the criteria and procedures prescribed by the Supreme Court in *Miller* v. *California*, 413 U.S. 15 (1973), and related cases, these materials are presumptively within the protection of the First Amendment. The rights guaranteed by the First Amendment are recognized as among the most fundamental rights possessed by a free people. In the present case, claims of abridgement of freedom of expression are conjoined with claims of denial of equal protection. When an equal protection challenge is based on a classification which results in abridgement of First Amendment rights, those seeking to uphold the classification bear a heavy burden.

The City did not discharge its heavy burden of justifying the prior restraint which these ordinances undoubtedly impose by merely establishing that they were designed to serve a compelling public interest. Since fundamental rights are involved, the City had the further burden of showing that the method which it chose to deal with the problem at hand was necessary and that its effect on protected rights was only incidental. The City could legally regulate movie theatres and bookstores under its police

powers by providing that such establishments be operated only in particular areas. It might also have validly provided that such establishments be operated only during certain hours. Cases permitting reasonable regulations as to "time, place and manner" were discussed by the Supreme Court in the recent opinion in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). However, this ordinance selects for special treatment particular business enterprises which fall within the general business classifications permissible under zoning laws and classifies them as regulated uses solely by referencee to the content of the consitutionally protected materials which they purvey to the public.

A local law, similar in its effect on First Amendment rights, was considered by the Supreme Court in *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972). There the City of Chicago had enacted an ordinance prohibiting picketing within 150 feet of any school building during classes "provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute." The Court held that the ordinance was invalid because it described what was permissible picketing in terms of its subject matter, stating, "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. The City of Chicago asserted that the orinance dealt with a compelling public interest and that its purpose was not to impose improper content censorship, but to prevent disruption in the schools. The Court recognized that the City did have a substantial interest in the end which it was seeking to achieve, but determined that the ordinance sought to advance this interest in a manner which was inconsistent with the requirements of the equal protection clause. The ordinances in the present case, like those in *Mosley*,

"slip[ped] from the neutrality of time, place, and circumstances into a concern about content." 408 U.S. at 99, quoting from: Kalven, The Concept of the *Public Forum: Cox* v. *Louisiana*, 1965 Sup Ct. Rev. 29.

Decided on the same day as *Mosley* was *Grayned* v. *City of Rockford, supra*, in which an anti-noise ordinance was upheld because it "is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights." 408 U.S. at 119. The Rockford ordinance applied to all noise or diversion which might disrupt school sessions or classes without any classifications which required scrutiny under the equal protection clause. In *Konigsberg* v. *State Bar*, 366 U.S. 36, 50-51 (1961), Mr. Justice Harlan spoke of "general regulatory statutes, *not intended to control the content of speech* but incidentally limiting its unfettered exercise, [which] have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests . . . " (Emphasis added.) The ordinances under review in the present case do not fit this description.

This court is keenly aware of the serious problems created in the major cities of the country by the deterioration of established neighborhoods. We are particularly sensitive to the problems of Detroit, the largest city within this Circuit. In holding that the two ordinances under review are unconstitutional, we do not suggest that the City of Detroit is powerless to deal with its urban problems. On the contrary, we urge it to heed the advice of Mr. Justice Marshall in his dissent in *Village of Belle Terre* v. *Boraas, supra*, where he stated, "I would find the challenged

ordinance unconstitutional. But I would not ask the village to abandon its goal of providing quiet streets, little traffic, and a pleasant and reasonably priced environment in which families might raise their children. Rather, I would commend the town to continue to pursue those purposes but by means of more carefully drawn and evenhanded legislation." 416 U.S. at 20.

The judgment of the district court is reversed for entry of a declaratory judgment that the two ordinances considered herein are invalid under the equal protection clause of the Fourteenth Amendment, and for further proceedings consistent therewith. Costs to the appellants.

CELEBREZZE, Circuit Judge, dissenting.

In 1962 the City of Detroit decided to take action against the creation of "skid row" areas by providing that no more than one of certain types of businesses could thereafter locate within 1000 feet of another. The "designated uses" so regulated included bars, hotels, pawnshops, billiard halls, second-hand stores, taxi dance halls, and other establishments which in proximity to each other gave areas a "skid row" appearance and thereby contributed to the decline of nearby residential communities.

Ten years later the City added four other businesses to the list of "designated uses"—adult book stores, adult motion picture theaters, adult mini motion picture theaters, and group "D" cabarets. The ordinance currently under attack requires that no more than two of these businesses be located within 1000 feet of each other. Pre-existing businesses are not affected, and waiver of the limitation can be obtained upon proof that a business's entry into a

neighborhood will not have the effect the ordinance was designed to prevent.[1]

Appellants filed suit in order to establish adult motion picture and mini motion picture theaters in certain areas of Detroit where the 1000-foot provision would bar their location. The District Court struck down a more restrictive section of the zoning code which is found to be "an almost total ban on uses conceded by the Defendants to be lawful." That ruling has not been appealed.

The District Court upheld the 1000-foot provision. It found that this section was "no greater than is essential to the furtherance of a legitimate governmental interest in preserving and stabilizing neighborhoods," and that it imposed only a "slight" and "incidental" burden on First Amendment rights.

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[1] The majority's opinion includes citations of the relevant portions of the ordinance under attack, except for the waiver provision, which is as follows:

"Section 66.0101.

The Commission may waive this locational provision for Adult Book Stores, Adult Motion Picture Theaters, Adult Mini Motion Picture Theaters, Group "D" Cabarets, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, or taxi dance halls if the following findings are made:

a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.

b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.

d) That all applicable regulations of this Ordinance will be observed."

The majority's opinion reverses this holding and renders Appellants free to locate their businesses without the interference of the challenged ordinance.

I believe that the Detroit ordinance[2] before us is a legitimate exercise of the City's police power. The plight of our cities requires that public officials have tools adequate to prevent their decline and collapse as centers of life and work. It was recognition of the need for a powerful, flexible means of coping with the complexities of urban growth which led the Supreme Court in 1926 to reject the challenge of private property owners to the very concept of zoning:

> Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the

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[2] The sole provision before us is the 1000-foot prohibition, barring the location of new adult businesses within 1000 feet of another use designated under section 66.1000.

meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

• • • • •

[T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. [Citation omitted.] A nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.

Village of Euclid v. *Ambler Realty Co.*, 272 U.S. 365, 386-87, 388 (1926).

A municipality's right reasonably to regulate uses of private property, in a manner consistent with the reach of its police power, has become ingrained in our law. Zoning may be based on values which are

> spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. *Parker*, 348 U.S. 26, 33 (1954).

As stated most recently in *Village of Belle Terre* v *Boraas*, 416 U.S. 1, 8 (1974), a zoning ordinance is

> economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the equal protection clause if the law be 'reasonable, not arbitrary,' [Citation omitted] and bears ' a rational relationship to a [permissible] state objective.' . . .
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

The City of Detroit has exercised its police powers to maintain its neighborhoods, if not as sanctuaries, at least as liveable habitats. It has attempted to prevent its neighborhoods from being overrun and dominated by "adult" business which bring crime in their wake and destroy residential qualities. The purpose of the 1000-foot provision was expressed in an affidavit of a qualified sociologist and Detroit councilman, Melvin Ravitz:

> The ordinance in question seeks to restrict the concentration of the specified uses on the ground that any such concentration is an actual danger sign in a residential neighborhood. It is such a threat in that it leads people to believe the neighborhood is declining and more of the kind of people who accept a declining neighborhood will flock there. This process hastens the reality of neighborhood decline.

Designated uses *in concentration* create a "skid row" atmosphere. Detroit's Common Council determined, and the zoning ordinances were amended to prevent this from recurring.[3]

As Appellants argue, the 1000-foot provision has an impact on their ability to market films which are not obscene, thereby affecting First Amendment rights. The test for an ordinance which affects First Amendment rights was succinctly stated in *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968):

> [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

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[3] The Ravitz affidavit vividly describes the evils which attend the development of "adult" skid-row areas. Other affidavits provide ample support for Detroit's method of combatting neighborhood decay. As one qualified journalist put it,

> "The real battle is with the criminalization of the sex business.
>
> What follows commercial pornography, which is the meat of the material offered by "adult" businesses, is prostitution. What follows prostitution is street crime, and what follows the crime reports is the demoralization of the legitimate businessmen and the drying up of the tax bases of our cities."

A Detroit City Plan Commission expert amplified this sentiment:

> "Aside from the deleterious appearance usually associated with this type of area, numerous social problems are also generated by "skid rows". These include the alcoholic, the drug addict, prostitution, crime, low rent housing for the single adult attracting senior citizens on a fixed income, the mission church, food kitchens, panhandlers, and generally an assembly point for all the human derelicts of society."

The majority and I agree that the ordinance is within Detroit's police power and that it furthers a compelling public interest — the preservation of urban neighborhoods.

We part ways over the last two hurdles of the *O'Brien* test.

The majority finds that the ordinance violates the equal protection clause by classifying films and printed materials on the basis of their content. In other words, the majority holds that Detroit's interest in preserving urban neighborhoods is not "unrelated to the suppression of free expression."

I do not view the 1000-foot provision as a regulation of speech on the basis of its content. Rather, it is a regulation of the right to locate a business based on the side-effects of its location. The interest in preserving neighborhoods is not a subterfuge for censorship.

In *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), on which the majority relies for its *per se* ban of regulation based on content,[4] the content of speech

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[4] The majority interprets *Mosley* to mean that no distinctions at all may be made between different categories of speech. Not even Mr. Justice Marshall, whose *Belle Terre* dissent is invoked, goes this far. His dissent in that case was based on the belief that fundamental rights were affected and that *Belle Terre* had been both under- and over-inclusive in its attempt to accomplish admittedly valid objectives. Mr. Justice Marshall's dissent reiterates the fourth part of the *O'Brien* test: "[O]nce it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden." 416 U.S. at 18. Had the distinction made by *Belle Terre* between unrelated persons and family members met this test, Mr. Justice Marshall would have upheld it, despite its distinguishing between persons on the basis of what are in his view

(continued on next page)

was the sole basis for the City's action. The *Mosley* ordinance forbade peaceful picketing near a school unless the picket's subject was a labor dispute. Furthermore, the *Mosley* ordinance was not a mere regulation of the right to picket, but was an absolute ban on picketing near schools, unless the picketing was labor-related.

This is not our case. The City of Detroit has not imposed an outright or *de facto* ban on adult establishments. As the District Court found, adult establishments may locate in "myriad locations in the City of Detroit" under the 1000-foot provision. It is only their concentration that is forbidden. The ordinance is, accordingly, a "time, place and manner" regulation, which the courts have consistently upheld. *Grayned* v. *City of Rockford,* 408 U.S. 104, 115 (1972); *Cox* v. *New Hampshire,* 312 U.S. 569, 576 (1941).

The basis for this regulation, furthermore, is not a desire on the City's part to censor the materials offered by such establishments. Rather, the ordinance is solicitous of the needs of adult businesses, as the Ravitz affidavit makes clear:

> Were they the sort that could flourish under conditions of concentration, then, indeed, we would seek to house all of them in one or two sections of the City. They are not, however, uses of this sort; like other

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(*continued from preceding page*)

constitutionally protected associations. An ordinance may utilize what on the surface appears to be a distinction based on content if the basis for the distinction rests on concerns unrelated to the suppression of constitutional rights. The basic question is whether the method chosen is "necessary to promote a compelling state interest," *Union Free School District,* 395 U.S. 621, 627 (1969). *See also Dunn v. Blumstein,* 405 U.S. 330 (1972); *Schuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969).

> commercial uses, they require proximity to residential areas and access to a suitable market. For this reason we cannot apply the usual zoning approach to them.

The ordinance goes out of its way not to bar these businesses from a convenient market. Its purpose is, rather, to prevent the breakdown of neighborhoods caused by undue concentrations of these businesses. If non-adult bookstores and theatres contributed to neighborhood blight in the same way that adult businesses do, the City would, no doubt, include them as designated uses under the ordinance, just as shoe-shine parlors and bars are included.

It is not a control on the basis of content in which the City of Detroit is engaging. It is, instead, a justifiable distinction in neighborhood impact that underlies the differential treatment between adult and non-adult businesses. This amply distinguishes our case from *Mosley,* where the City was unable to justify a differential treatment of peaceful labor picketing and peaceful non-labor picketing. The only conceivable reason for the difference in *Mosley* was that the City sought "to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley,* 408 U.S. at 95. That is not the purpose of Detroit's ordinance.

I am convinced that the Detroit ordinance clears the fourth and final hurdle of *O'Brien* as well—that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of [Detroit's] interest" in preserving neighborhoods.

Detroit has provided that no more than two designated uses may locate within 1000 feet of each other. This insures that adult businesses are able to locate in many

places in the City and that residents have convenient access to their offerings. Thus, publishers and consumers of adult materials are not significantly affected by the ordinance. It is only the businessmen who seek to make a larger profit out of operating adult businesses by locating near similar enterprises who suffer. The effect of the ordinance, therefore, is to prevent a concentration of adult businesses in any area of the City but not to stifle the flow of commerce between distributors and the public.

The majority suggests that the City could devise a less restrictive and even-handed method of furthering its objective. It suggests no less restrictive alternative, however, and I can see none. If Detroit is to prevent its neighborhoods from turning into sex-oriented skid rows, catering to the tastes of only one stratum of society and driving out stable residential populations, it must be allowed to limit the number of adult establishments in any area of the City. That is what the 1000-foot provision seeks to do.

Nor does the majority suggest a feasible, more even-handed approach. It suggests that Detroit could legally accomplish its goals by requiring *all* bookstores and theaters to locate in enclaves within the City or by restricting their hours of operation. Neither solution would serve the purpose of preventing concentrations of "adult" businesses. Indeed, the first suggested solution would accomplish precisely what Detroit seeks to prevent. Both solutions, furthermore, would impose restrictions on non-adult bookstores and theaters that have no relation to any demonstrated legitimate public purpose. Thus, they would run afoul of the first two parts of the *O'Brien* test. The majority's call for "even-handed" legislation would suggest that it considers adult and non-adult bookstores and theaters to pose similar threats to the stability of neighborhoods.

The record in this case belies this conclusion and establishes the legitimate reasons for treating adult establishments in the same manner as pool rooms and bars, without treating non-adult theaters and bookstores similarly.

I too am vigilant to protect our First Amendment freedoms. They must not be eroded out of misguided good intention. The First Amendment, however, was not intended to be the death-knell of cities. Detroit has carefully attempted to prevent its neighborhoods from becoming sex-oriented, crime-ridden wastelands, without unduly infringing the public's right to buy and the publisher's right to distribute non-obscene materials. The First Amendment does not condemn this effort.

It seems to me that if we are to prevent our cities from becoming uninhabitable jungles, we must, within constitutional safeguards, restore to our cities the right of self-government.

I find the zoning is a proper exercise of the police powers of the City of Detroit and would affirm the District Court's findings and Judgment.

APPENDIX B

JUDGMENT

U. S. COURT OF APPEALS—SIXTH CIRCUIT

(Filed June 16, 1975)

American Mini Theatres, Inc., a Michigan corporation, and Pussy Cat Theatres of Michigan, Inc., a Michigan corporation, Plaintiffs-Appellants, v. Roman Gribbs, Mayor of the City of Detroit, et al., Defendants-Appellees.	No. 74-2129

Before: EDWARDS, CELEBREZZE and LIVELY, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed for entry of a declaratory judgment that the two ordinances considered are invalid under the equal protection clause of the Fourteenth Amendment, and for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered By Order Of The Court

/s/ John P. Hehman
Clerk

Issued as Mandate:

COSTS:

Filing fee .....$_____
Printing $_____
Total $_____

APPENDIX C

ORDER STAYING MANDATE

U. S. COURT OF APPEALS—SIXTH CIRCUIT

(Filed July 18, 1975)

Nos. 74-2129 & 74-2303

AMERICAN MINI THEATRES, INC., ET AL.,
Plaintiffs-Appellants,
v.
ROMAN GRIBBS, ET AL.,
Defendants-Appellees.

BEFORE: EDWARDS, CELEBREZZE AND LIVELY, Circuit Judges.

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered By Order Of The Court

John P. Hehman, Clerk
By: /s/ Grace Keller
Chief Deputy

APPENDIX D

OPINION

U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Filed March 25, 1974)

Nortown Theatre, Incorporation, a body corporate of the State of Michigan,
Petitioner,
vs.
Roman Gribbs, Mayor of the City of Detroit,
John Nichols, Police Commissioner of The Detroit Police Department,
Michael Glusak, Corporation Counsel of the City of Detroit,
Creighton Lederer, Acting Commissioner of the Department of Building & Safety Engineering for the City of Detroit,
Charles A. Blessing, Director-Secretary of the City Planning Commission, jointly and severally,
Defendants,

Civil Action No. 39796

Variety Books, Incorporated, a Michigan Corporation,

Petitioner,

vs.

Roman Gribbs, Mayor of the City of Detroit,
John Nichols, as Police Commissioner of The Detroit Police Department,
Michael Glusak, Corporation Counsel of the City of Detroit,
Creighton Lederer, Acting Commissioner of the Department of Building & Safety Engineering for the City of Detroit,
Charles A. Blessing, Director-Secretary of the City Planning Commission, jointly and severally,

Defendants.

Civil Action No. 40168

American Mini Theatres, Inc., a Michigan corporation and
Pussy Cat Theatres of Michigan, Inc., a Michigan corporation,

Plaintiffs,

vs.

Roman Gribbs, Mayor of the City of Detroit,
John Nichols, Police Commissioner of The Detroit Police Department,
Michael Glusak, Corporation Counsel of the City of Detroit,
Creighton Lederer, Acting Commissioner of the Department of Building & Safety Engineering for the City of Detroit,
Charles A. Blessing, Director and Secretary,

Defendants.

Civil Action No. 40198

The three above-captioned civil actions present substantially identical challenges to the constitutionality of certain ordinances of the City of Detroit. For purposes of the motions for summary judgment filed in each case by the Defendants, the cases shall be treated together in this opinion.

AMERICAN MINI THEATRES, INC., and PUSSY CAT THEATRES OF MICHIGAN, Plaintiffs in Civil Action No. 40198, are owners and lessees of a motion picture theatre in the City of Detroit which is devoted to the showing of so-called adult films from which minors are excluded. They have been denied a certificate of occupancy

for their theatre by the City of Detroit, by reason of the provision of its Ordinances 742-G and 743-G.

NORTOWN THEATRE, INC., Plaintiff in Civil Action No. 39796, operates a movie theatre of the same character, also in the City of Detroit. It received a letter on March 9, 1973 from the Corporation Counsel of the City of Detroit advising that the theatre was in violation of provisions of the same Ordinances. The letter warned that, unless the theatre complied with the Ordinances, proceedings to enjoin its operation would be brought.

VARIETY BOOKS, INC., Plaintiff in Civil Action No. 40168, operates a retail bookstore in the City of Detroit which is devoted to the sale of so-called "adult books" to adult customers only. It has been denied a change in occupancy permit and has been threatened with legal proceedings to enjoin its operation by the City of Detroit by reason of the provisions of Ordinance 742-G.

The Plaintiffs in each case assert that these city Ordinances violate their Constitutional rights under the First and Fourteenth Amendments of the Federal Constitution because their language is so vague as to deny due procsss of law; because they fail to establish procedural safeguards; because they invade the area of protection guaranteed by the First Amendment; and because they deprive Plaintiffs of equal protection of the law afforded to other theatre operators and bookstores. Plaintiffs seek declaratory and injunctive relief.

Defendants have moved for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure on the grounds that Plaintiffs' complaint fails to state a claim against Defendants upon which relief can be granted. An affidavit of Dr. Mel Ravitz, a sociologist at Wayne State

University, located in Detroit, and a former member of the Common Council of the City of Detroit, was filed in support of the motions. Much of the information contained in the affidavit was presented to the Corporation Counsel of the City of Detroit for consideration by him and by the Common Council of the City of Detroit at the time the Ordinances were enacted. See Dr. Ravitz' letter of October 17, 1962 attached to Defendants' motions. The affidavit recites some sociological reasons for regulating the locations of businesses of the type operated by Plaintiffs.

Ordinances 742-G and 743-G regulate the location of certain types of businesses in the City of Detroit. These include three so-called adult businesses; adult bookstores, adult motion picture theatres (including adult mini motion picture theatres), and Group D cabarets (a cabaret which features topless dancers, et cetera. They also include establishments for the sale of beer and liquor, hotels, motels, pawnshops, pool or billiard halls, public lodging houses, second hand stores, shoeshine parlors and taxi dance halls. The present Ordinances amend or replace earlier Ordinances regulating many of these same businesses, but not adult motion picture theatres or adult bookstores. The purpose of the Ordinances, as stated therein, is to ensure that the adverse effects of such businesses, particularly when several are concentrated in a certain area, will not contribute to the blighting or downgrading of surrounding neighborhoods (see prefatory language of Ordinance 742-G, Section 66.0000). Before enacting these Ordinances, the Common Council had the expert opinion of Dr. Ravitz, referred to above, on the effect on neighborhoods of concentrations of businesses of the sort regulated. Their effect is deleterious, he stated. They attract the kinds of people who frequent these places and drive away those

who do not. This contributes to the decline of a neighborhood. A concentration of such businesses also causes the neighborhood to appear to be declining and this causes a lack of neighborhood pride, resulting in a further decline. Nor is it possible to set aside certain areas where these business uses are to be concentrated, as is done with industrial uses, since the businesses, like other commercial uses, must have some proximity to residential areas and access to a suitable market.

The Ordinances provide two limitations on the location of any businesses of this character; i.e., the regulated uses. The Ordinances prohibit more than two such uses within 1000 feet of one another; and, in the case of adult theatres and adult bookstores, as well as Class D cabarets, prohibit their location within 500 feet of a residential dwelling or rooming unit. In the case of each of these restrictions, there is a provision for waiver. With respect to the 1000-foot requirement, the Ordinances provide:

> Section 66.0101.
>
> The Commission may waive this locational provision for Adult Book Stores, Adult Motion Picture Theaters, Adult Mini Motion Picture Theaters, Group "D" Cabarets, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, or taxi dance halls if the following findings are made:
>
> a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.
>
> b) That the proposed use will not enlarge or encourage the development of a "skid row" area.

> c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program or urban renewal.
>
> d) That all applicable regulations of this Ordinance will be observed.

The 500 feet from aresidential dwelling on rooming unit prohibition may be waived:

> . . . if the person applying for the waiver shall file with the City Plan Commission a petition which indicates approval of the proposed regulated use by 51 per cent of the persons owning, residing or doing business within a radius of 500 feet of the location of the proposed use, ...

The petitioner is required to attempt to contact all eligible locations within this 500-foot radius, and must maintain a list of all addresses at which no contact was made. The Commissioner of the Department of Buildings and Safety Engineering is authorized to adopt rules governing the procedure for securing petitions. The Ordinances define adult theatres on the basis of the type of films shown therein and adult bookstores on the basis of the type of books in their stock in trade.

Defendants assert that the Ordinances are not vague, that the classifications bear a rational relationship to a State objective and that there is a compelling State interest for enacting them.

The right of the City of Detroit to reasonably regulate and restrict the location of certain uses, whether business, residential or industrial, is clear; e.g., *Euclid* v. *Ambler Co.*,

272 U.S. 365 (1926). Plaintiffs concede this general proposition but assert that the Ordinances here, when applied to them, are invalid. Defendants' purpose in enateing them, say Plaintiffs, is not to protect neighborhoods from deleterious business but, rather, is for the purpose of preventing the showing of certain types of films and the sale of certain types of books. It is not for this Court to look behind the stated reasons for enacting the Ordinances. As the United States Supreme Court held in *United States* v. *O'Brien*, 391 U.S. 367 (1967):

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:
>
> "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray* v. *United States*, 195 U.S. 27, 56 (1904).
>
> This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona* v. *California*, 283 U.S. 423, 455 (1931). [391 U.S. at p. 283.]

When, as here, the City has stated a reason for adopting an ordinance which is a subject of legitimate concern, that statement of purpose is not subject to attack.

Nor may the Court substitute its judgment for that of the Common Council of the City of Detroit as to the methods adopted to deal with the City's legitimate concern to

preserve neighborhoods, so long as there is some rational relationship between the objective of the Ordinance and the methods adopted.

It is the claim of Plaintiffs that the provisions of the Ordinances that define adult theatre, adult mini theatre, and adult bookstores are vague. The Ordinances, however, carefully and specifically describe the type of material categorized as "adult". Adult Motion Picture Theaters are defined as those presenting material "distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' ". Adult Book Stores are defined as those having "a substantial or significant portion" of their stock in trade in materials which are "distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specific Sexual Activities' or 'Specific Anatomical Areas' ". These terms are each described in specific detail. Plaintiffs do not point out just what is vague about the above language. The words "distinguished" or "disttinguishing" are frequently used in statutes relating to ballots. See, *Words and Phrases* "Distinguished Ballot", "Distinguishing Mark". The word "characterized" has not, so far as the Court can determine, had similar judicial construction. However, "charactetristic" or "characteristic of" appear in various workmen's compensation statutes in which an injury must be characteristic of a business of the employer in order to be compensable as an occupational disease. E.g., *Carter* v. *International Detrola Corp.*, 328 Mich 367 (1950). The word causes no problem in such a statute nor should it here. See also, *Lever Bros. Co.* v. *Proctor & Gamble Mfg. Co.*, 49 F. Supp. 443 (D.C. Md., 1943). Similarly, the word "substantial" as used in the definition of Adult Book Store is not so indefinite as to render the Ordinance void and unenforceable. That term

had been construed as having an ascertainable meaning in numerous statutory schemes. See, e.g. *Busch* v. *Service Plastics, Inc.,* 261 F. Supp. 136, 141 (N.D. Ohio 1966); *Roop* v. *Richardson,* 324 F. Supp. 1130 (W.D. Va. 1971); *State ex rel Saveland Park Holding Corp.* v. *Wieland,* 69 NW 2d 217, 224.

Plaintiffs claim that the Ordinances are unconstitutional because the waiver provisions are vague and overbroad and improperly delegate authority to the City Plan Commission. Plaintiffs urge that, if they meet all of the conditions for waiver, the City Plan Commission need not waive the prohibition. The Ordinances may be construed, however, so that the word "may", in the provision that if certain conditions are met the City Plan Commission "may" waive the location prohibitions, is mandatory. The Michigan Supreme Court has not construed these Ordinances nor has any Michigan Court construed these waiver provisions. However, it is a sound rule of construction that statutes or ordinances should be construed so as to be valid and constitutional if this can be done. This Court believes that the Michigan Court will construe the word "may" to mean "shall" in the waiver provisions of these Ordinances. In the early case of *McBrian* v. *City of Grand Rapids,* 56 Mich 95 (1885), a statute provided that the Board of Public Works should vote for sealed proposals and "may" contract with the lowest reasonable bidder. The Michigan Supreme Court construed the word "may" as if it meant "shall". In *Smith* v. *City Commission,* 281 Mich 235 (1937), the Michigan Supreme Court quoted, with approval, from *Corpus Juris,* saying:

> "A mandatory construction will usually be given to the word 'may' where public interests are concerned, and the public or third persons have a claim *de jure* that the power conferred should be exercised,

> or whenever something is directed to be done for the sake of justice or the public good; but never for the purpose of creating a right." 59 C.J. pp. 1082-1085. [281 Mich at p. 243]

Plaintiffs conceded that the word "may" is frequently construed as mandatory but point to the fact that the present Ordinance elsewhere uses the word "shall". However, where, as here, specific standards are set up under which the waiver "may" be made, it is fair construction that the waiver must be granted if all of the conditions are met.

The State's right to require that particular businesses be located at specified distances to one another has been approved in a number of zoning cases. *O'Connor et al* v. *Board of Zoning Appeals,* 140 Conn 65, 98 Atl. 2d 515; *Glackman* v. *City of Miami Beach,* 51 S. 2d 294.

Nor is there any due process or any other constitutional violation in requiring 51 per cent of adjacent property owners to consent to a regulated use before permitting waiver. This question was before the United States Supreme Court in *Thomas Cusack Co.* v. *City of Chicago,* 242 U.S. 526 (1917). The City of Chicago, by ordinance, prohibited erection of billboards in any block in which one-half of the buildings were used exclusively for residence purposes without first obtaining the consent in writing of owners of a majority of the frontage of property on both sides of the street. The plaintiffs there claimed that the ordinance was invalid because it delegated legislative power to the property owners. The Court held that the ordinance was a reasonable exercise of the State's police power since:

> . . ., much evidence was intorduced upon the trial of the case, from which the Supreme Court finds that fires had been started in the accumulation of com-

bustible material which gathered about such billboards; that offensive and unsanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals. [242 U.S. at p. 529]

These factors were:

> . . . sufficient to convincingly show the propriety of putting billboards, as distinguished from buildings and fences in a class by themselves . . . and to justify the prohibition against their erection in [a residential section of a city] in the interest of safety, morality and decency of the community. [242 U.S. at pp. 529-530]

With respect to the waiver provisions, the United States Supreme Court stated:

> The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property . . .. To this we may add that such a reference to a neighborhood of the propriety of having carried on within it trades or occupations, which are properly the subject of regulation in the exercise of the police power, is not uncommon in laws which have been sustained against every possible claim of unconstitutionality, such as the right to maintain saloons, *Swift* v. *People*, 162 Illinois, 534, and as to the location of garages, *People* v. *Ericsson*, 263 Illinois, 368. Such treatment is plainly applicable to offensive structures. [242 U.S. 529 at p. 530]

The Court distinguished the case where the establishment of the standards is given to property owners as in *Eubank* v. *Richmond*, 226 U.S. 137 (1912). It said:

> A sufficient distinction between the ordinance there considered and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar abcolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances. [242 U.S. at p. 531]

The requirement of consent to a waiver by a percentage of the adjoining property owners is not a device unique to the instant Ordinance. It is relatively common in zoning or licensing of deleterious businesses. *People* v. *Gottlieb*, 337 Mich 276 (1935), a used-car business; *Cady* v. *City of Detroit*, 289 Mich 499 (1939), a trailer camp.

Plaintiffs assert that the different treatment afforded adult theatres and bookstores, as opposed to theatres and bookstores, generally, denies them the equal protection of the law. The equal protection clause, of course, does not require that all persons or all businesses be treated the same. "Sometimes the grossest discrimination can lie

in treating things that are different as though they were exactly alike . . . " *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971). What is required is that the differing treatment be properly justified.

Because the Ordinances distinguish adult theatres and bookstores from ordinary theatres and bookstores on the basis of the content of their respective wares, the classification is one which restrains conduct protected by the First Amendment. See *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968). The appropriate standard for reviewing the classification, therefore, is a test of close scrutiny. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 670 (1966); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). Under this test, the validity of the classification depends on whether it is necessary to further a compelling State interest.

The compelling State interest which the Defendants point to as justifying the restrictions on locations of adult theatres and bookstores is the preservation of neighborhoods, upon which adult establishments have been found to have a destructive impact. The affidavit of Dr. Mel Ravitz clearly establishes that the prohibition of more than one regulated use within 1000 feet is necessary to promote that interest. This provision therefore does not offend the equal protection clause.

However, no arguments are advanced by Defendants as to how the prohibition of the regulated uses within 500 feet of a single dwelling or rooming unit furthers the legitimate interest the City has in preserving a residential area or neighborhood. Indeed, where only a single dwelling or rooming unit is involved, we fail to see how the prohibition of the Ordinance affords any protection whatsoever to a neighborhood or residential area.[1] We must weigh this imperceptible benefit to the City's stated interest against the severe impact imposed by the Ordinance on the Plaintiffs. No area of the City is specifically set aside or designated for the regulated uses. There are few, if any, locations other than industrial areas and the downtown commercial area of Detroit where there is not a single dwelling or living unit within 500 feet. Thus, the effect of the restriction is an almost total ban on uses conceded by the Defendants to be lawful. While such an extreme effect might not render the restriction invalid under the equal protection clause if the City had demonstrated that its compelling interest was promoted thereby, no such showing has here been made. We conclude that the 500-foot restriction is not necessary to promote any expressed compelling State interest and is therefore invalid under the equal protection clause.

Plaintiffs' principal attack upon the Ordinances is their effect on First Amendment rights. Defendants respond that the Ordinances do not limit or restrict in any way what may be shown in licensed adult theatres or sold in adult bookstores. The nature of the material is of concern only as it relates to whether the location is to be regulated under the Ordinances. The Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight.

The Ordinances in the instant case prevent certain conduct, namely the operation of certain theatres and book-

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[1] In this respect, the instant case differs from those such as *Cady* when at least 50 per cent of the defined area was residential.

stores. In doing so, they also, of course, have the effect of circumscribing speech. There may be, however, some regulation even of "pure speech". Even the press, like any other business, can be regulated on business and economic matters. See *Associated Press* v. *United States,* 326 U.S. 1, in which the Associated Press was held accountable for violations of the antitrust laws. In the same tenor are cases upholding the application of wage and hour laws and other labor laws to employers and employees of newspapers or other enterprises protected by the First Amendment. Where there is a sufficiently important governmental interest in regulating the non-speech element of conduct or of a business, incidental regulations on First Amendment freedoms may be justified. Thus, the United States Supreme Court has upheld the authority of governmental units to regulate picketing, *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969); the activities of lobbyists, *United States* v. *Harriss,* 347 U.S. 615 (1954); the operation of sound trucks, *Kovacs* v. *Cooper,* 336 U.S. 77 (1949); activities near a school, *Grayned* v. *Rockford,* 408 U.S. 104 (1972).

The standards or criteria which must be met to justify governmental regulation where speech and non-speech elements are combined in the same course of conduct are set forth in *United States* v. *O'Brien, supra,* where the Court said:

> This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the qualify of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.
> [391 U.S. at p. 376-377]

Applying those standards to the instant case, the power to license and zone businesses and prohibit their location in certain areas is clearly within the constitutional power of the City. The government interest, i.e. the preservation and stablization of neighborhoods in the City of Detroit, is unrelated to the suppression of free expression. First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in specific locations. Plaintiffs would not contend that they are entitled to operate a theatre or bookstore, which are commercial businesses, in a residentially zoned area; nor could they claim the right to put on a performance for profit in a public street. Admittedly the regulation here is more restrictive, but it is of the same character.

The City of Detroit has a substantial governmental interst in protecting and maintaining the character of residental neighborhoods. This interest is furthered by the prohibition against more than one regulated use within 1000 feet of one another. As stated above, in connection with analysis of the Ordinances under the equal protection clause, the City's interest is not furthered by the prohibition of a regulated use within 500 feet of a *single* dweiling

or rooming unit. Similarly, while the restriction on First Amendment freedoms, in the case of the 1000-foot prohibition, is no greater than is essential to the furtherance of a legitimate governmental interest in preserving and stabilizing neighborhoods, the same cannot be said of the 500-foot prohibition. In prohibiting regulated uses within 500 feet of a single dwelling or living unit, the Ordinance imposes a greater incidental restriction on First Amendment freedoms than is essential to preserve and stablize residential neighborhoods.

For the foregoing reasons, those portions of the Ordinances which relate to the prohibition against two or more regulated uses within 1000 feet are declared to be valid; those portions which prohibit such uses within 500 feet of a dwelling unit are declared invalid.

Appropriate declaratory judgments may be presented.

/s/ CORNELIA G. KENNEDY
U. S. District Judge

/s/ LAWRENCE GUBOW
U. S. District Judge

Dated: March 22, 1974

APPENDIX E

ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Nortown Theatre Incorporated, a body corporate of the State of Michigan, Petitioner, vs. Roman Gribbs, Mayor of the City of Detroit, John Nichols, lice Commissioner of the Detroit Police Department, Michael Glusak, Corporation Counsel of the City of Detroit, Creighton Lederer, Acting Commissioner of the Department of Buildings & Safety Engineering for the City of Detroit, Charles A. Blessing, Director-Secretary of the City Planning Commission, jointly and severally, Defendants.	No. 39796

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on Apr 25, 1974.

PRESENT: Honorable LAWRENCE GUBOW, U.S. District Judge.

This matter having come before this Court on Complaint for Declaratory Judgment in the above captioned case challenging the constitutionality of Detroit Ordinances No. 742-G (particularly Sections 5-2-1.1 and 5-2-1.2) and 743-G (particularly Sections 32.0007, 66.0000, 66.0101, 66.0103, 94.0300 and 95.0300); Memoranda of Law having been submitted by counsel for the respective parties, and having heard oral argument on behalf of all parties; this Court being fully advised in the premises and having filed a written Opinion, the contents of which are incorporated herein by reference, and having directed that Judgment be entered in accordance therewith now, therefore,

IT IS ORDERED AND ADJUDGED as follows:

1. Those portions of Ordinances No. 742-G and 743-G which relate to the prohibition of two or more "regulated uses" within one thousand feet (1000) of one another, are declared valid.

2. Those portions of Ordinances No. 742-G and 743-G which prohibit "regulated uses" within five hundred feet (500) of a dwelling unit are declared invalid.

LAWRENCE GUBOW
U. S. District Judge

APPENDIX F

JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

American Mini Theatres, Inc., a Michigan corporation, and Pussy Cat Theatres of Michigan, a Michigan corporation, Petitioner, vs. Roman Gribbs, Mayor of the City of Detroit, John Nichols, Police Commissioner of the Detroit Police Department, Michael Glusak, Corporation Counsel of the City of Detroit, Creighton Lederer, Acting Commissioner of the Department of Buildings & Safety Engineering for the City of Detroit, Charles A. Blessing, Director-Secretary of the City Planning Commission, jointly and severally, Defendants.	No.40198

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on May 20 1974.

PRESENT: Honorable CORNELIA G. KENNEDY, U.S. District Judge.

This matter having come before this Court on Complaint for Declaratory Judgment in the above captioned case challenging the constitutionality of Detroit Ordinances No. 742-G (particularly Sections 5-2-1.1 and 5-2-1.2) and 743-G (particularly Sections 32.0007, 66.0000, 66.0101, 66.0103, 94.0300 and 95.0300); Memoranda of Law having been submitted by counsel for the respective parties, and having heard oral argument on behalf of all parties; this Court being fully advised in the premises and having filed a written Opinion, the contents of which are incorporated herein by reference, and having directed that Judgment be entered in accordance therewith now, therefore,

IT IS ORDERED AND ADJUDGED as follows:

1. Those portions of Ordinances No. 742-G and 743-G which relate to the prohibition of two or more "regulated uses" within one thousand feet (1,000) of one another, are declared valid.

2. Those portions of Ordinances No. 742-G and 743-G which prohibit certain "regulated uses" within five hundred feet (500) of a dwelling unit are declared invalid.

CORNELIA G. KENNEDY
U. S. District Judge

APPENDIX G

ORDINANCE NO. 742-G

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Ordinance No. 390-G, entitled: "An Ordinance to establish districts in the City of Detroit; to regulate the use of land and structures therein, to regulate and limit the heighth, the area, the bulk and location of buildings; to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; to regulate and determine the area of yards, courts and other open spaces; to regulate the density of population; to provide for the establishment of a program to develop and upgrade the appearance of places of businesses or other establishments and to provide a local assessment district for the payment of the cost of such improvements according to the benefits to be derived therefrom; to provide for the administration and enforcement of this Ordinance; to provide for a Board of Appeals, and its powers and duties; and to provide a penalty for the violation of the terms thereof," as amended, be and the same is hereby amended by adding new sections to be known as Section 32.0007, 32.0023, and 66.0103 and by amending Sections 66.0000, 66.0101, 66.0102, 94.0300, 95.0300, 101.0100 and 102.0100, to read as follows:

Section 32.0007 Adult

Adult Book Store

An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by

their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

Adult Motion Picture Theater

An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below) for observation by patrons therein.

Adult Mini Motion Picture Theater

An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing, or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), for observation by patrons therein.

For the purpose of this Section, "Specified Sexual Activities" is defined as:

1. Human Genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

And "Specified Anatomical Areas" is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Section 32.0023 Cabaret

Group "D" Cabaret

A cabaret which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers.

66.0000 Regulated Uses

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e. not more than two such uses within one thousand feet of each other which would create such adverse effects).

Uses subject to these controls are as follows:

Adult

Adult Book Store

Adult Motion Picture Theater

Adult Mini Motion Picture Theater

Cabaret

Group "D" Cabaret

Establishments for the sale of beer or intoxicating liquor for consumption on the premises.

Hotels or motels

Pawnshops

Pool or billiard halls

Public lodging houses

Secondhand stores

Shoeshine parlors

Taxi dance halls

Section 66.0101.

The Commission may waive this locational provision for Adult Book Stores, Adult Motion Picture Theaters, Adult Mini Motion Picture Theaters, Group "D" Cabarets, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, or taxi dance halls if the following findings are made:

a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.

b) That the proposed use will not enlarge or encourage the development of a "skid row" area.

c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighhood conservation nor will it interfere with any program of urban renewal.

d) That all applicable regulations of this Ordinance will be observed.

Section 66.0102

For establishments for the sale of beer or intoxicating liquor for consumption on the premises, the Common Council may waive the locational requirements if the findings required in Section 66.0101 (a) through (d) can be made ~~or waived for just cause~~ and after receiving a report and recommendation from the City Plan Commission.

Section 66.0103

It shall be unlawful to hereafter establish any Adult Book Store, Adult Motion Picture Theater, Adult Mini Theater or Class "D" Cabaret within 500 feet of any building containing a residential, dwelling or rooming unit. This prohibition may be waived if the person applying for the waiver shall file with the City Plan Commission a petition which indicates approval of the proposed regulated use by 51 per cent of the persons owning, residing or doing business within a radius of 500 feet of the location of the proposed use, the petitioner shall attempt to contact all eligible locations within this radius, and must maintain a list of all addresses at which no contact was made.

The Commissioner of the Department of Buildings and Safety Engineering shall adopt rules and regulations governing the procedure for securing the petition of consent provided for in this section of the ordinance. The rules shall provide that the circulator of the petition requesting a waiver shall subscribe to an affidavit attesting to the fact that the petition was circulated in accordance with the rules of the Department of Buildings and Safety Engineering and that the circulator personally witnessed the signatures on the petition and that the same were affixed to the petition by the person whose name appeared thereon.

The City Plan Commission shall not consider the waiver of locational requirements set forth in Sections 66.0000

to 66.0102 until the above described petition shall have been filed and verified.

94.0300 Permitted with Approval Uses

The following uses, and uses accessory thereto, shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as set forth in Article VI, Section 65.0000 and to all conditions hereinafter listed.

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theater as regulated by Section 66.0000.

Adult Mini Motion Picture Theater as regulated by Section 66.0000.

Cabaret

Group "D" Cabaret as regulated by Section 66.0000.

Confection manufacture.

Dental products, surgical, or optical goods manufacture.

Fraternity or sorority houses.

Go-Cart tracks, subject to the following requirements, except as may be adjusted by the Commission:

a) Parking areas shall be surfaced with gravel, slag, or other comparable material and treated so as to prevent the raising of dust.

b) Ingress or egress shall be only from the principal street side of the property as may be determined by the Commission.

c) If lighting is provided, all such lighting shall be subdued, shaded, and focused away from all dwellings.

d) An opaque fence or wall of wood or masonry construction, six feet in height, shall be constructed between the approved site and any adjacent property zoned in a residential district classification. If such fence is of wood construction, the design and type of fence shall be subject to the approval of the Commission.

e) In all instances where a wall or fence is required, said wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of precast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.

f) No part of the driving track shall be within 300 feet of property zoned in a residential district classification.

g) Any track surface or other area to be used for the operation of a go-cart shall be of an asphaltic or concrete material.

h) All light standards, poles, or other appurtenances shall be effectively padded or screened so as to prevent injury to drivers of the vehicles; baled hay or other suitable shock absorbing material shall be placed around all turns or curves in the track.

i) All vehicles shall be provided with mufflers to eliminate objectionable noise. The Commission may require a change in mufflers to reduce exhaust noises, if, in its opinion, such noise becomes a nuisance.

j) Permitted hours of operation shall be 10:00 A.M. to 10:00 P.M. Monday through Saturday, and 12:00 noon to 10:00 P.M. on Sundays.

Jewelry manufacture

Lithographing

Miniature golf courses, subject to the following requirements, except as may be adjusted by the Commission:

a) Parking areas shall be surfaced with gravel, slag, of other comparable material and treated so as to prevent the raising of dust.

b) Ingress and egress shall be only from the principal street side of the property as may be determined by the Commission.

c) If lighting is provided, all such lighting shall be subdued, shaded, and focused away from all dwellings.

d) An opaque fence or wall of wood or masonry construction, six feet in height, shall be constructed between the approved site and any adjacent property zoned in a residential district classification. If such fence is of wood construction, the design and type of fence shall be subject to the approval of the Commission.

e) In all instances where a wall or fence in required, said wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of precast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.

f) Loudspeakers or public address systems may be used only for control purposes, shall play no music, and shall be removed if, in the opinion of the Commission, such operation constitutes a nuisance.

g) No part of the playing surface of a miniature golf course shall be located within fifty (50) feet of any property zoned in a residential district classification.

h) Permitted hours of operation shall be 8:00 A.M. to 10:30 P.M. Monday through Saturday, and 12:00 noon to 10:30 P.M. Sunday.

Motels or hotels as regulated by Section 66.0000

Motor vehicle body or fender bumping and painting shops and major motor repairing provided that all operations are conducted entirely within a building, and further provided that any wall facing, abutting, or adjacent to residentially zoned property shall consist of a solid blank wall with no openings whatsoever, excepting that a required secondary exit door, of minimum requirements, shall be permitted and provided further, that all open storage vehicles awaiting repairs or service be enclosed by an opaque wall or fence of masonry or wood construction six feet in height and maintained in a neat and orderly fashion at all times.

Multiple family dwellings, which may contain non-residential uses as specified in Article VIII, Section 86.0113.

Photoengraving

Printing or engraving shops

Public lodging houses, as regulated by Section 66.0000

Rebound tumbling centers, subject to the following requirements, except as may be adjusted by the Commission:

a) Parking areas shall be surfaced with gravel, slag, or other comparable material and treated so as to prevent the raising of dust.

b) Ingress and egress shall be only from the principal street side of the property as may be determined by the Commission.

c) If lighting is provided, all such lighting shall be subdued, shaded, and focused away from all dwellings.

d) An opaque fence or wall of wood or masonry construction, six feet in height, shall be constructed between the approved site and any adjacent property zoned in a residential district classification. If such fence is of wood construction, the design and type of fence shall be subject to the approval of the Commission.

e) In all instances where a wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of precast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.

f) Loudspeakers or public address systems may be used only for control purposes, shall play no music, and shall be removed if, in the opinion of the Commission, such operation constitutes a nuisance.

g) No rebound tumbling apparatus or part thereof shall be located within one hundred feet of any property zoned in a residential district classification.

h) Permitted hours of operation shall be 8:00 A.M. to 10:30 P.M. Monday through Saturday, and 12:00 noon to 10:30 P.M. Sunday.

Residential uses combined in structures with permitted commercial or other uses

Restaurants, drive-in, when located on a street designated on the master plan of trafficways as a major thoroughfare, subject to the following requirements except as may be adjusted by the Commission or Council:

a) An unpierced masonry wall or opaque wood fence six feet in height shall be provided on all sides of the premises so used; provided, that in all instances where a wall or fence is required, said wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of precast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.

b) On the side of the property abutting the access street, the above described wall or opaque wood fence may be reduced to a height of three feet six inches.

c) Wire mesh fencing not exceeding two inch mesh and made of number nine or heavier wire may be used in lieu of a masonry wall on those lot lines not adjacent to a street or alley but contiguous to property zoned in a business or industrial district classification.

d) No fence or wall shall be required on that portion of a lot line where there is a building or structure serving the purpose of a fence or wall. Any such building or structure located on adjacent property shall be protected from damage as specified in a) above.

e) The entire parking area shall be paved with a permanent surface of concrete or asphaltic cement and shall be graded and drained in accordance with the city

plumbing code. Any unpaved area of the site shall be landscaped with lawn or other horticultural materials, maintained in a neat and orderly fashion at all times, and separated from the paved area by a raised curb or other equivalent barrier.

And Provided, that a written report of the Commission's decision shall be filed with the Common Council, which shall become final 30 days after the filing thereof unless within that time a protest against such decision is filed with the Council signed by the applicant or by an owner of property within 300 feet of the premises in question. In such event the Council shall, by resolution, approve or disapprove such use.

Rooming houses

Single or two-family dwellings, which may contain home occupations as regulated in Section 83.0105, paragraphs b through h

Special small tool, die, and gauge manufacturing employing not more than 15 persons in manufacturing operations, Provided, that a written report of the Commission's decision shall be filed with the Common Council, which shall become final 30 days after the filing thereof unless within that time a protest against such decision is filed with the Council signed by the applicant or by an owner of property within 300 feet of the premises in question. In such event the Council shall, by resolution, approve or disapprove such use.

Taxi dance halls, as regulated by Section 66.0000

Toiletries or cosmetics goods manufacture

Town houses

Wearing apparel manufacture

Wholesaling, warehousing, storage, or transfer buildings, but excluding steel warehousing, storage of bulk petroleum or related products, or garbage or rubbish. All materials must be completely enclosed within a building.

Uses similar to the above specified uses

95.0300 Permitted with Approval Uses

The following uses, and uses accessory thereto, shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as set forth in Section 65.0000 and to all conditions hereinafter listed.

Adult

Adult Book Store as regulated by Section 66.0000.

Adult Motion Picture Theater as regulated by Section 66.0000.

Adult Mini Motion Picture Theater as regulated by Section 66.0000.

Cabaret

Group "D" Cabaret as regulated by Section 66.0000.

Heliports, subject to the approval of the Common Council after report and recommendation from the Detroit Aviation Commission and the City Plan Commission and upon finding that such use is suitable in relation to the features and objectives of the master plan and not contrary to the spirit, intent, and purpose of this district.

Motor vehicle body or fender bumping and painting shops and major motor repairing provided that all operations are conducted entirely within a building, and further, provided, that any wall facing, abutting, or adjacent to residentially zoned property shall consist of a solid blank

wall with no openings whatsoever, excepting that a required secondary exit door, of minimum requiremnts, shall be permitted, and provided further, that all open storage of vehicles awaiting repairs or service shall be enclosed by an opaque wall or fence six feet in height and maintained in a neat and orderly fashion at all times.

Multiple-family dwellings, which may be combined in structures with permitted commercial uses

Public lodging houses, as regulated by Section 66.0000

Rooming houses

Taxi dance halls, as regulated by Section 66.0000

Town houses

Wholesaling, warehousing, storage, or transfer buildings, but excluding steel warehousing, storage of bulk petroleum or related prducts, or garbage or rubbish. All material must be completely enclosed within a building.

The following manufacturing uses:

Wearing apparel manufacturing

Confection manufacturing

Dental products, surgical, or optical goods manufacturing

Jewelry manufacturing

Toiletries or cosmetic manufacturing

Similar manufacturing uses as determined by the Commission

101.0100 Uses Permitted as a Matter of Right

All uses permitted as a matter of right in the B4 or B5 Districts excepting new residential uses and hospitals or

other institutions for the care of humans, hotels or motels; and provided, that the provisions of Section 66.0000 shall also apply to this Section 101.0100.

102.0100 Uses Permitted as a Matter of Right

Uses permitted as a matter of right in the B4 or B5 districts, except public or private elementary, junior high, or high schools; new residential uses; hotels or motels, hospitals or other institutions for the care of humans; and provided, that the provisions of Section 66.0000 shall also apply to this Section 102.0100.

Uses permitted as a matter of right in the B6 district except wholesale or retail produce markets, storage or killing of poultry or small game for retail or wholesale trade, and meat or fish products manufacture or processing; and provided, that the provisions of Section 66.0000 shall also apply to this Section 102.0100.

Section 2. All ordinances or parts of ordinances in conflict herewith are hereby repealed only to the extent necessary to give this ordinance full force and effect.

(JCC p. 2425-30, October 3, 1972)

Passed October 24, 1972.

Approved October 26, 1972.

Published November 1, 2, 3, 1972.

Effective November 2, 1972.

GEORGE C. EDWARDS
City Clerk

APPENDIX H

AN ORDINANCE to amend Chapter 5, Article 2 of the Code of Detroit by amending Sections 5-2-1.1, 5-2-3 and 5-2-24, and by adding new sections to be known as Sections 5-2-1.2, 5-2-9.1 and 5-2-24.1 to include coin operated motion picture devices, adult motion picture theaters, adult mini motion picture theaters, drive-in theaters and concert halls and setting forth the requirements therefor.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Chapter 5, Article 2 of the Code of the City of Detroit be amended by amending Sections 5-2-1.1, 5-2-3 and 5-2-24, and by adding new sections to be known as Sections 5-2-1.2, 5-2-9.1 and 5-2-24.1 to read as follows:

Sec. 5-2-1.1.

No amusement consisting of an amusement park, arcade, archery gallery, baseball batting and practice net, outdoor circus, menagerie or exhibits, concert cafe, concert hall, coin-operated motion picture device, golf school, including driving nets, putting greens, practice driving courses or miniature golf courses, kiddie ride, riding device, shooting gallery, tracks, including bicycles, go-cart, midget auto racing or similar devices, or rebound tumbling or trampoline center shall hereafter be established within the city unless a petition shall be filed with the police department signed by fifty-one per cent of the people living or doing business within a radius of five hundred feet of the premises upon which the amusement is to be established; provided, that miniature golf courses may be established upon

the petition of fifty-one per cent of the people living or doing business within a radius of two hundred feet of the premises upon which such miniature golf course is to be established.

It shall be unlawful for any person to hereafter operate an Adult Motion Picture Theater, Adult Mini Motion Picture Theater or Drive-in Theater until he shall have complied with the requirements of the Official Zoning Ordinance, the provisions of this article and other applicable ordinances of the City of Detroit.

Sec. 5-2-1.2. Definitions

For the purpose of this article the following words and phrases shall have the meanings respectively ascribed to them by this section:

Adult Motion Picture Theater:

An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), for observation by patrons therein.

Adult Mini Motion Picture Theater:

An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below) for observation by patrons therein.

"Specified Sexual Activities":

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

"Specified Anatomical Areas":

1. Less than completely and opaquely covered;

   (a) Human genitals, pubic region, (b) buttock, and

   (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Sec. 5-2-3.

The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already issued upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this city regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby.

Sec. 5-2-9.1

It shall be unlawful for any licensee, his agent or employee to knowingly permit any exhibition or advertising in connection with any establishment regulated under this article depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Area" to be displayed in any manner which is visible from any public street or highway.

Sec. 5-2-24. The license fee for all motion picture theaters, except adult motion picture theaters and adult mini motion picture theaters including all motion picture theaters which, in addition to motion pictures, offer other entertainment, amusement or diversions or which, in addition to motion pictures, offer or exhibit regular stage shows, so-called, or theatricals, shall be based on seating capacity as follows:

(a) Under five fundred seats, fifty-five dollars annually.

(b) Five hundred to one thousand seats, seventy dollars annually.

(c) One thousand one to two thousand seats, ninety-five dollars annually.

(d) Over two thousand seats, one hundred seventy dollars annually.

Sec. 5-2-24.1. The license fee for all adult motion picture theaters and adult mini motion picture theaters, including those which, in addition to adult motion pictures offer other entertainment, amusement or diversions or which, in addition to adult motion pictures offer or exhibit regular stage shows so-called, or theatricals, shall be based on seating capacity as follows:

(A) Adult mini motions picture theaters having less than fifty seats, fifty-five dollars annually.

(B) Adult motion picture theaters:

1. Fifty to five hundred seats, fifty-five dollars annually.
2. Five hundred one to one thousand seats, seventy dollars annually.
3. One thousand one to two thousand seats, ninety-five dollars annually.

4. Over two thousand seats, one hundred seventy dollars annually.

Section 2. This ordinance is declared necessary for the preservation of the public peace, health, safety and welfare of the people of the City of Detroit and is hereby given immediate effect.

Section 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed only to the extent necessary to give this ordinance full force and effect.

(JCC p. 2430-32, October 3, 1972)

Passed October 24, 1972.

Approved October 26, 1972.

Published November 1, 2, 3, 1972.

Effective November 2, 1972.

GEORGE C. EDWARDS
City Clerk

APPENDIX I

ORDINANCE NO. 891-G

CHAPTER 68

AMENDMENT TO TEXT OF ZONING ORDINANCE
Requirement of consent of 51% of adjacent property owners to waive prohibition against establishment of adult businesses in certain areas of city.

AN ORDINANCE to amend Ordinance No. 390-G, entitled: "An Ordinance to establish districts in the City

of Detroit; to regulate the use of land and structures therein; to regulate and limit the height, the area, the bulk and location of buildings; to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; to regulate and determine the area of yards, courts and other open spaces; to regulate the density of population; to provide for the establishment of a program to develop and upgrade the appearance of places of businesses or other establishments and to provide a local assessment district for the payment of the cost of such improvements according to the benefits to be derived therefrom; to provide for the administration and enforcement of this Ordinance; to provide for a Board of Appeals, and its powers and duties; and to provide a penalty for the violation of the terms thereof," as amended, by amending Sections 66.0103, 101.0300, 102.0300 and 104.0100.

WHEREAS, It has been demonstrated that the establishment of adult businesses in business districts, which are immediately adjacent to and which serve residential neighborhoods, has a deleterious effect on both the business and residential segments of the neighborhood, causing blight and a downgrading of property values; and

WHEREAS, The prohibition against the establishment of more than two regulated uses within 1,000 feet of each other serves to avoid the clustering of certain businesses which, when located in close proximity to each other, tend to create a "skid row" atmosphere; and

WHEREAS, Such prohibition fails to avoid the deleterious effects of blight and devaluation of both business and residential property values resulting from the establishment of an adult book store, adult motion picture theatre,

adult mini motion picture theatre or Group "D" cabaret in a business district which is immediately adjacent to and which serves residential neighborhoods; and

WHEREAS, Concern for, and pride in, the orderly planning and development of a neighborhood should be encouraged and fostered in those persons who comprise the businessand residential segments of that neighborhood; and

WHEREAS, Those business districts in the City of Detroit which serve residential areas (and the downtown loop area which serves the whole city), are designated as B1, B2, B3, B4, B5, and B6 zoned districts; and

WHEREAS, Adult motion picture theatres, adult mini motion picture theatres, adult book stores and Group "D" cabarets are not permitted in B1, B2 or B3 zoned districts, and are only permitted with the approval of the City Plan Commissioin in B4, B5 and B6 zoned districts; and

WHEREAS, the City Plan Commission should be guided by the expressed will of those businesses and residents which are immediately adjacent to the proposed location of, and therefore most affected by the existence of, any adult motion picture theatre, adult mini motion picture theatre, adult book store or Group "D" cabaret in a B4, B5 or B6 zoned district;

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Ordinance No. 390-G, entitled: "An Ordinance to establish districts in the City of Detroit; to regulate the use of land and structures therein; to regulate and limit the height, the area, the bulk and location of buildings; to regulate and restrict the location of trades

and industries and the location of buildings designed for specified uses; to regulate and determine the area of yards, courts and other open spaces; to regulate the density of population; to provide for the establishment of a program to develop and upgrade the appearance of places of businesses or other establishments and to provide a local assessment district for the payment of the cost of such improvements according to the benefits to be derived therefrom; to provide for the administration and enforcement of this Ordinance; to provide for a Board of Appeals, and its powers and duties; and to provide a penalty for the violation of the terms thereof," as amended, be and the same is hereby amended by amending Sections 66.0103, 101.0300, 102.0300, and 104.0100, to read as follows:

Section 66.0103

It shall be unlawful to hereafter establish any Adult Bookstore, Adult Motion Picture Theatre, Adult Mini Motion Picture Theatre or Group "D" Cabaret in a B4, B5 or B6 Zoned District if the proposed location is within 500 feet of a Residentially Zoned District. This prohibition shall be waived upon the presentment to the City Plan Commission of a validated petition requesting such waiver, signed by 51% of those persons owning, residing, or doing business within 500 feet of the proposed location.

The Commissioner of the Department of Buildings and Safety Engineering shall adopt rules and regulations governing the procedure for securing the petition of consent provided for in this section of the ordinance. The rules shall provide that the circulator of the petition requesting a waiver shall subscribe to an affidavit attesting to the fact that the petition was circulated in accordance with the rules of the Department of Buildings and Safety Engineering and that the circulator personally witnessed the signatures

on the petition and that the same were affixed to the petition by the person whose name appeared thereon.

The City Plan Commission shall not consider the waiver of locational requirements set forth in Sections 66.0000 to 66.0102 until the above described petition, if required shall have been filed and verified.

Section 101.0300

The following uses, and uses accessory thereto, shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as specified in Section 65.0000 and to all conditions hereinafter listed.

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theaters as regulated in Section 66.0000.

Adult Mini Motion Picture Theaters as regulated by Section 66.0000.

Cabaret

Group "D", Cabarets as regulated by Section 66.0000.

Uses permitted as a matter of right in the M2 district

Hotels or motels as regulated by Section 66.0000

Section 102.0300

The following uses and uses accessory thereto shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as set forth in Article VI, Section 65.0000 and to any other conditions hereinafter listed. For heliports and industrial uses, the Commission may approve the use only after a report and recommendation has been received from the Industrial Review Committee.

Any use permitted as a matter of right in the M3 district

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theaters as regulated by Section 66.0000.

Adult Mini Motion Picture Theaters as regulated by Section 66.0000.

Cabaret

Group "D", Cabarets as regulated by Section 66.0000.

Heliports

Hotels or motels

Section 104.0100

Uses permitted as a matter of right in the M3 District

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theaters as regulated by Section 66.0000.

Adult Mini Motion Picture Theaters as regulated by Section 66.0000.

Cabaret

Group "D" Cabarets as regulated by Section 66.0000

Abrasives manufacture

Acetylene manufacture

Ammonia manufacture

Annealing or heat treating plants

Balls or bearings manufacture

Battery rebuilding

Bed spring manufacture

Bleaching powder manufacture

Boiler works

Bolts or nuts manufacture

Brick or building block manufacture

Candle manufacture

Carbonic gas manufacture or storage

Carbonic ice manufacture

Cattle or sheep dip manufacture

Cellophane or celluloid manufacture

Ceramic products manufacture

Chlorine gas manufacture

Clay products manufacture

Concrete batching plants

Concrete pipe or concrete pipe products manufacture

Dextrine manufacture

Docks (waterway shipping)

Dyestuffs manufacture

Elevators, grain

Engine manufacture

Feed or grain mill

Felt manufacture

Glass manufacture

Glucose manufacture

Graphite manufacture

Gutta percha manufacture or treatment

Ink manufacture (from basic substance)

Jute fabrication

Open storage of equipment or supplies for building or construction contractors

Pharmaceutical products manufacture

Phenol manufacture

Pyroxylin plastic manufacture or processing

Roofing materials manufacture excluding tar products

Rope manufacture

Rug manufacture

Salt works

Sewage disposal plants

Shoe polish manufacture

Soap manufacture

Starch manufacture

Steam generating plants

Sugar refining

Terra cotta manufacture

Tire manufacture

Turpentine manufacture

Wallboard manufacture

Wholesaling, warehousing, storage, or transfer building

Wire manufacture

Yeast manufacture

Uses similar to the above specified uses

Accessory uses, incidental to and on the same zoning lot as the principal use

Section 2. This Ordinance is declared necessary for the preservation of the public peace, health, safety and welfare of the people of the City of Detroit and is hereby given immediate effect.

(JCC p. 707-710, April 2, 1974).

Passed April 23, 1974.

Approved April 30, 1974

Published May 1, 2, 3, 1974.

Effective May 2, 1974.

JAMES H. BRADLEY
City Clerk

Supreme Court, U. S.
FILED
DEC 3 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-312

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,

Petitioners,

v.

AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation,

Respondents.

— — —

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,

Petitioners,

v.

NORTOWN THEATRE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 28, 1975
CERTIORARI GRANTED OCTOBER 20, 1975

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
962-8745—962-8732

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The following opinions, judgments, orders, and ordinances were printed in the Appendix filed with the Petition for Certiorari, at the pages noted in parentheses:

Appendix A. Opinion of Sixth Circuit Court of Appeals .....(15-39)

Appendix B. Judgment of Sixth Circuit Court of Appeals .....(40-41)

Appendix C. Order Staying Mandate of the Sixth Circuit Court of Appeals..... (42)

Appendix D. Joint Opinion of U.S. District Court, Eastern District of Michigan .....(43-60)

Appendix E. Judgment of U.S. District Court in Nortown case .....(61-62)

Appendix F. Judgment of U.S. District Court in American Mini Theatre case .....(63-64)

Appendix G. Ordinance 742-G .....(65-79)

Appendix H. Ordinance 743-G .....(80-84)

Appendix I. Ordinance 891-G .....(84-92)

The following pleadings, partial transcript, and docket entries are considered relevant by the parties, and are reprinted here:

Appendix J. Defendants' Motion for Summary Judgment and Affidavits in Support Thereof, in *Nortown* case 1-39

Appendix K. Answer to Defendants' Motion for Summary Judgment and Affidavit in Support Thereof, in *Nortown* case 40-46

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Appendix L. Partial Transcript (pp. 28-32) of Proceedings at Oral Argument on Motions for Summary Judgments, in *Nortown* and *American Mini Theatres* cases, on Sept. 17, 1973, before the Hon. Cornelia G. Kennedy and Hon. Lawrence Gubow 47-50

Appendix M. Stipulation to Incorporate by Reference Defendants' Briefs and Affidavits in *Nortown* case, into Defendants' Motion for Summary Judgment in *American Mini Theatres* case 51-52

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Appendix O. Answer to Defendants' Motion for Summary Judgment and Affidavit in Support Thereof (Same as Answer in *Nortown* case above at pp. 40-46)

Appendix P. List of Relevant Docket Entries in *Nortown* case 55-56

Appendix Q. List of Relevant Docket Entries in *American Mini Theatres* case 57-58

APPENDIX J

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND AFFIDAVITS IN SUPPORT THEREOF, IN NORTOWN CASE

(A 97)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Nortown Theatre, Incorporated, a body corporate of the State of Michigan, Plaintiff, vs. Roman Gribbs, Mayor, John Nichols, Police Commissioner, Michael Glusac, Corporation Counsel, Creighton Lederer, Acting Commissioner, of the Department of Building and Safety Engineering, Charles A. Blessing, Director-Secretary of the City Planning Commission, jointly and severally, Defendants.	Civil Action File No. 39796

Defendant's Motion for Summary Judgment

Now come the Defendants, Roman S. Gribbs, Mayor, John F. Nichols, Police Commissioner, Michael M. Glusac, Corporation Counsel, Creighton Lederer, Acting Commissioner of the Department of Building and Safety Engineering, Charles A. Blessing, Director-Secretary of the City Planning Commission, by their attorneys, Michael M. Glusac, Corporation Counsel, Maureen P. Reilly and John E.

Cross, Assistants Corporation Counsel, and in accordance with the provisions of Rule 56(b) of the Federal Rules of Civil Procedure move this Honorable Court for a Summary Judgment for the following reasons:

1. The Complaint filed by the Plaintiff fails to state a claim against the Defendants upon which relief can be granted.

(A 98) 2. That Plaintiff's allegation of a deprivation of Civil Rights by reason of the enactment of allegedly unconstitutional ordinances is without merit in fact and in law.

This motion is based upon affidavits of Dr. Mel Ravitz, Sociologist; William Walsh, Realtor; Ogust Mai Stewart, Realtor; Gail Sheehy, Contributing Editor, New York Magazine; and Lino Canevaro, Head Planner, City Plan Commission, Exhibits and Brief in Support of Motion for Summary Judgment, all of which are filed herewith.

Respectfully submitted,

Michael M. Glusac
Corporation Counsel
Maureen P. Reilly
John E. Cross
Assistants Corporation Counsel
Attorneys for Defendants
1010 City-County Building
Detroit, Michigan 48226
224-4557
By: /s/ Maureen P. Reilly

April 23, 1973

EXHIBIT 1

(A 99) *Affidavit of Mel Ravitz*

State of Michigan,
County of Wayne—ss.

Mel Ravitz, being first duly sworn, deposes and says:

That he was born in New York City, January 7, 1924 and has been a resident of the City of Detroit since 1929; that he was educated in the Detroit Public schools, graduated from Detroit Central High School in 1942 and received a Bachelor of Arts Degree in history from Wayne University in 1948, was granted an M.A. Degree in Sociology from the New School for Social Research, New York, 1949, and was awarded a Ph.D. Degree in sociology from the University of Michigan, 1955.

That he served as a news editor of Radio Station WDET in 1949 and was Director of Community Organizations for the Detroit City Plan Commission, 1953 to 1960, and presently holds the rank of Professor of Sociology at Wayne State University where has has taught since 1949. In 1961 he was elected to the Detroit Common Council for a four-year term; re-elected in 1965 and again in 1969. In 1966, he was elected Chairman of the Wayne County Board of Supervisors; re-elected in 1969. In 1968, elected Chairman of the Metropolitan Detroit Youth Foundation; re-elected in 1970. In 1968, elected Vice Chairman of the Southeast Michigan Counsel of Governments; re-elected in 1969. In 1969, elected President, Detroit Common Council. In 1970, elected Chairman of the Southeast Michigan Council of Governments; re-elected in 1971.

That he is a member of American Sociological Association, Ohio Valley Sociological Society, Michigan Sociologi-

cal Society, American Federation of Teachers, Comprehensive Health Planning Council of Southeast Michigan, Family Service Society of Detroit, TB (A 100) and Health Society, Detroit Chapter, National Hemophilia Foundation.

That he is the author of more than 44 articles on the subject of urban problems and social action some of which are as follows: "The Sociologist as a Participant in an Urban Planning Program", (Journal of the American Institute of Planners, Spring, 1954, Vol. XX, No. 2.); "Urban Renewal Faces Critical Roadblocks", Journal of the American Institution of Planners, Winter, 1955, Vol. XXI, No. 1; "Some Socio-Demographic Considerations of Settlement House Relocation", The Journal of Educational Sociology, April, 1956, Vol. 29, No. 8; "Block That Blight", Adult Leadership, May 1956, Vol. 5, No. 1; "Detroit Social Workers Mobilize Citizen Aid for Urban Renewal", (with Adelaide Dinwoodie) Journal of Housing, July, 1956, Vol. 13, No. 7; "Use of the Attitude Survey in Neighborhood Planning", Journal of the Institute of Planners, Fall, 1957, Vol. XXIII, No. 4; "Urban Renewal and the Changing Pattern of the City", Alpha Kappa Deltan: A Sociological Journal, Winter, 1958, Vol. XXVIII, No. 1; "Urban Renewal: A Challenge to Sociologists", Notes to an Exhibit, Detroit City Plan Commission, Mimeographed, Fifty-first Annual Meeting, American Sociological Society, Detroit, September 1956; "The Culture Concept and Urban Design", The Student Publication of the School of Design, North Carolina State College, Vol. 8. No. 3, 1958; "The Sociologist as A Policy Maker in the Planning Process", Graduate Comment, April 1964, Vol. VI, No. 5; "Urban Conditions that Challenge the University", the Educational Record, Published by the American Council on Education, Washington, D.C., Summer, 1965; "Is Detroit Different?" Agenda, January, 1966, Vol. 2, No. 1; "Cities are Changing", Educational Leadership, October, 1967, Vol. 25, No. 1; and

"The Crisis in Our Cities: An (A 101) Action Perspective", in A City in Racial Crisis, (ed.) Leonard Gordon, Wm. C. Brown Publishers, U.S.A., 1970; "Urban Education: Today and Tommorrow", in Urban Education in the 1970's, (ed.) A. Harry Passow, Teachers' College Press, Teachers' College, Columbia University, New York, 1971.

That he is familiar with the Official Zoning Ordinance of the City of Detroit and more particularly with Section 66.0000 which provides for the regulation of bars, motels, pawn shops, taxi-dance halls, adult book stores, adult motion picture theaters, and cabarets which offer topless dancing. That the ordinance in question seeks to restrict the concentration of the specified uses on the ground that any such concentration is an actual danger sign in a residential neighborhood. It is such a threat in that it leads people to believe the neighborhood is declining and more of the kind of people who accept a declining neighborhood will flock there. This process hastens the reality of neighborhood decline.

That many people who live in neighborhoods in the City view a concentration of the above mentioned uses as undesirable and believe it is bad. Here a basic sociological axiom is relevant: if people believe something is true even if it is not originally, they will tend to act as if it were true and in so doing help produce the condition that was originally only believed. If residents of any neighborhood believe that the concentration of the proscribed uses damage the neighborhood they will act as if it were true and will seek to move away and allow in people with different standards; they will allow their property to decline, they will not engage in the full range of conservation attitudes and activities so (A 102) necessary to the maintenance of a healthful residential neighborhood.

That it is a fact that the concentration of such proscribed uses where the people don't want them leads inevitably to

rate cutting, indiscriminate displays of merchandise, illegal activities in order to attract scarce customers all of which helps to deteriorate a neighborhood.

That a residential neighborhood is a very fragile thing. It can be ruined very easily and ruin comes usually not by dramatic physical events, such as sheer age or the sudden invasion of barbarians to an area. Ruin comes to a neighborhood because its residents somehow begin to have their confidence in their area shaken. It matters not what the cause of this shakened confidence, whether it is a legitimate or phony cause. Good neighborhoods are maintained because people who live in them believe that they are sound and good and will continue to be so in the months and years ahead. It is far too risky for a city to allow indiscriminately into residential areas any number of commercial uses which have already been identified as those whose concentration help shake peoples confidence.

That rightly or wrongly, these uses in the minds of many people including the legislative body of the City of Detroit are the symbols of decay and deterioration. They are not the only such uses; there are other uses mentioned throughout the ordinance which also have special controls because they too have under certain circumstances undesirable images.

(A 103) That we should recognize that most normal residential neighborhoods have certain cohesion and stability that is sufficient to permit them to function adequately and healthfully and to resist a few of the regulated uses. A neighborhood can handle more such uses if they are spaced so as to have no more than two per thousand feet. Some neighborhoods, it was recognized, could be maintained as sound and secure with even more than the permitted two uses per thousand feet. Accordingly, the ordi-

nance permits the waiver of this distance requirement depending upon the condition of the neighborhood and the attitudes of its people.

That some people have suggested that the problem is really not one of the concentration of uses but rather a police problem. This begs the question. Obviously, the police cannot be on daily duty in front of the uses mentioned above. Moreover, even if they could, this would not alter the residents image of these uses and their consequent behavior. Rather than attempt the impossible job of police control, this ordinance aims to prevent the concentration of those uses that serve as magnets of activities that are deemed to lead to neighborhood deterioration. This is a better method than attempting to police after the uses are installed.

That I recoginze further that use of zoning instrument to control the concentration of uses is in itself unusual. Usually a Zoning Ordinance seeks deliberately to concentrate certain kinds of uses so as to keep them from interfering with each other. The use of a Zoning Ordinance to scatter or disperse uses is in itself a rarity. This exception to (A 104) normal use of the Zoning Ordinance is explained, I believe, by the particular nature of the uses in question. Were they the sort that could flourish under conditions of concentration, then, indeed, we would seek to house all of them in one or two sections of the City. They are not, however, uses of this sort; like other commercial uses, they require proximity to residential areas and access to a suitable market. For this reason we cannot apply the usual zoning approach to them.

That I think the ordinance has worked very effectively. It was aimed at protecting residential neighborhoods from the concentration of uses deemed inimical to sound neigh-

borhood living. To a very significant extent, I believe this ordinance is achieving its objective.

Let me note that failure to protect residential neighborhoods would mean an extension of blight and decay to other areas of the city, thereby nullifying the joint city-federal efforts to eliminate slums and to prevent them.

Deponent further sayeth not.

/s/ Mel Ravitz

Subscribed and sworn to before me this 23rd day of April, 1973.

Lena Bommarito
Notary Public, Wayne County, Michigan
My commission expires July 20, 1975

(A 105)

CITY OF DETROIT
Common Council

October 17, 1962

Mr. John F. Hathaway
Assistant Corporation Counsel
10th Floor, City-County Building
Detroit 26, Michigan

Dear John:

This letter is in response to your request for my observations on the Anti-Skid Row Ordinance.

Let me begin by recognizing that this ordinance is no guarantee that skid rows will be eliminated from urban areas; indeed, as a sociologist I well recognize that skid

row is more than a mere concentration of certain kinds of physical uses. Conversely it is possible to have a concentration of the proscribed uses and still not have a blighted area.

I recognize further that use of a zoning instrument to control the concentration of uses is in itself unusual. Usually a Zoning Ordinance seeks deliberately to concentrate certain kinds of uses so as to keep them from interfering with each other. The use of a Zoning Ordinance to scatter or disperse uses is in itself a rarity. This exception to the normal use of the Zoning Ordinance is explained, I believe, by the particular nature of the uses in question. Were they the sort that could flourish under conditions of concentration, then, indeed, we would seek to house all of them in one or two sections of the city. They are not, however, uses of this sort; like other cemmercial uses, they require proximity to residential areas and access to a suitable market. For this reason we cannot apply the usual zoning approach to them.

I think the ordinance has worked very effectively. It was aimed at protecting residential neighborhoods from the concentration of uses deemed inimical to sound neighborhood living. To a very significant extent, I believe this ordinance is achieving its objective.

(A 106) Let me note that failure to protect residential neighborhoods would mean an extension of blight and decay to other areas of the city, thereby nullifying the joint city-federal efforts to eliminate slums and to prevent them.

The ordinance in question seeks to restrict concentration of six specified uses on the ground that any such concentration is an actual danger sign in a residential area. It is such a threat in that it leads people to believe the neigh-

borhood is declining, and more of the kind of people who accept a declining neighborhood flock there. This process hastens the reality of neighborhood decline.

It is argued that the proscribed uses serve the people presently living in a neighborhood. To a limited degree this is true, but more to the point is the fact that a concentration of such uses serves to attract people who frequent these places and to drive away people who don't.

Another related point must be made too: many people who live in many areas view such concentration as undesirable and believe it is bad. Here a basic sociological axiom is relevant: if people believe something is true, even if it is not originally, they will tend to act as if it were true, and in so doing help produce the condition that was originally only believed. If residents of any neighborhood believe that the concentration of the proscribed uses damage the neighborhood, they will act as if it were true and will seek to move away and allow in people with different standards; they will allow their property to decline; they will not engage in the full range of conservation attitudes and activities so necessary to the maintenance of a healthful residential neighborhood.

As an actual fact that concentration of such proscribed uses where the people don't want them leads inevitably to rate cutting, indiscriminate displays of merchandise, illegal activities in order to attract scarce customers. These things, too, help to deteriorate a neighborhood.

A residential neighborhood is a very fragile thing. It can be ruined very easily. And ruin comes usually not by dramatic physical events, such as sheer age or the sudden invasion of barbarians to an area. Ruin comes to a neighborhood because its residents somehow begin to have their confidence in their area shaken. It matters not what the

cause of this shaken confidence, whether it (A 107) be a legitimate or phony cause. Good neighborhoods are maintained because people who live in them believe that they are sound and good and will continue to be so in the months and years ahead. It is far too risky for a city to allow indiscriminately into residential areas any number of commercial uses which have already been identified as those whose concentration help shake people's confidence.

The question has been raised: Why pick on these particular uses? The answer is simply that rightly or wrongly these uses in the minds of many people are the symbols of decay and deterioration. They certainly are not the only such uses that should be controlled; all night movies, burlesque shows, drive-ins, etc., also must be controlled, because they, too, have the same undesirable image.

Let us recognize that most normal residential neighborhoods have a certain cohesion and stability that is sufficient to permit them to function adequately and healthfully and to resist a few such proscribed uses. A neighborhood can handle more such uses if they are spaced so as to have no more than two per thousand feet. While two was originally an arbitrary number, experience has shown that there is some justification for it. Some neighborhoods, it was recognized, could be maintained as sound and secure with even more than the permitted two uses per thousand feet. Accordingly, the ordinance permits the Common Council to grant leeway in a neighborhood depending on the particular additional use and on the condition of the neighborhood and the attitudes of its people.

Some people have suggested that the problem is really not one of concentration of uses, but is rather a policing problem. This begs the question. Obviously, the police cannot be on daily duty in front of each such use. More-

over, even if they could, this would still not alter the residents' image of these uses and their consequent behavior. Rather than attempt the impossible job of police control, this ordinance aims to prevent concentration of those uses that serve as magnets of activities that are deemed to lead to neighborhood deterioration. This is better than attempting to police after the uses are installed.

Other people have contended in specific instances that their one more use will not make any difference in the area. This may be true, and it is within the judgment of the Common Council to determine whether it will or won't make any difference. This is (A 108) a sphere of judgment which thus far has been well exercised.

In summary then, John, I believe the ordinance is a very good one and that it has been applied with proper discretion and eminent reasonableness by both the Plan Commission and the Common Council.

I trust this letter will serve your purpose.

Sincerely,

/s/ Mel

EXHIBIT 2

(A 109)

DETROIT POLICE DEPARTMENT

Inter-Office Memorandum

Date April 10, 1973

To: Assistant Corporation Counsel Maureen Reilly

Spbject: Escalation of Adult Type Businesses in Detroit Area.

Since the Redrup decision, (Magna Carta for pornographers), we have seen an escalation of adult book stores from two in Detroit to a total of thirty-five at the present time in the Detroit area. The number of adult theatres also has escalated from two to twenty-five. There are at least seven art studios or camera clubs in the area that provide live human models. These adult type businesses have been concentrated in certain areas or clusters, however, they are now penetrating the fringe areas.

Following is a list of adult type businesses by area or cluster:

Downtown Area:

1543 Broadway	Broadway Book Shop	Nasri Fiani
1 Cadillac Square	Follies Theatre	Gorelick Bros.
140 Cadillac Square	Richard's Place (book store)	John Schipiano
58 E. Columbia	Gem Art Theatre	Gem Amus. Co.
1021 Farmer	Projection Room Mini Theatre	G.A.L.L. Corp.
62 Monroe	Cinex Theatre	Aaron Kolt
66 Monroe	Tip Top Book Store	Royal News Co.
118 Monroe	National Burlesk	Gem Amus. Co.

Total 8

Woodward Corridor:

2511 Woodward	Stone Theatre	Milton Jacobson
2967 "	Regal Books	Richard Gawthrop
3929 "	Peek-A-Rama Theatre	G.A.L.L. Corp.
3925 "	Scorpio Book Store	G.A.L.L. Corp.
12119 "	Monterey Party Store (books)	Mr. Channan
13304 "	Movie Screening Room	Al Huley (G.A.L.L. Corp.)
13308 "	Studio of Living Art	Roger Harvey
13527 "	World Wide Magazines	Frank Hakim
13531 "	Book Center	Richard Rose
13722 "	Coin Shop (books)	William Maloney
13843 "	Hiland Theatre	Gorelick Bros.
14041 "	Art Adult Books	George Lucas
16445 "	Centerfold Studio	William Robinson
16145 "	Blue Orchid Studio	Donald Morgan
16473 "	Krim Theatre	Charles Cobb
16514 "	Live Figure Models	Herman Schnnault
16533 "	Six Mile Theatre	Joseph Busic
16541 "	Uptown Book Store	Soof & Mazellis
16549 "	Woodward—6 Mile Theatre	George Luca
17530 "	Oxford Book Store	John Pruitt
17730 John R.	L'Art Cinema	Herman Sussman
18944 Woodward	Adult Book Store	Charles Cobb
20500 "	Frisco' Adult Mini Theatre	Gabriel Glantz

Total 23

West Eight Mile—Schaefer Cluster:

13625 W. 8 Mile Rd.	Lido Mini Theatre	Gorelick Bros.
13705 "	Adult News Book Store	Fred Navarro
13715 "	Book Shack	Melvin Harris
13737 "	Auroral Morning Studio	—
14011 "	Blue Orchid Studio	Donald Morgan
14305 "	Discount Book Center	Stanford Sikor
16401 "	Uptown Book Store	Soof & Mazellis

Total 7

West Side Area:

3520 Grand River	Globe Art Theatre	Louis Brooks
2002 Dragoon	Eddie's News Stand	Ed Korzenowski
7604 W. Vernor	Fun Shack	Ralph Zammit
6356 Michigan	Palace Art Studio	—
6739 Michigan	Jack's Book Store	Jack Kantor
8418 Michigan	Adultfare Mini Theatre	John G. Clark

Total 6

North West Area:

16641 W. Warren	Leisure Book Mart	Ed Burdziak
18728 W. Warren	Escape Book Store	Thomas Kalita
17610 Joy Road	Limepole Book Inn	Smith—Wiska
18211 Joy Road	Hazel's Book Center	Hazel Lewan
15830 Plymouth	Atlas Theatre	Bernard Scklussel
16521 Plymouth	Parisian Book Store	Frank Julian
15751 Grand River	Book Shack #2	Melvin Harris
13135 Fenkell	Variety Theatre	Albert Dizel
21220 Fenkell	Irving Theatre	Bernard Schlussel
21234 Fenkell	Adult World Book	John P. Housman
16750 Telegraph Road	Pussy Cat Mini Theatre	Gorelick Bros.
22575 W. 8 Mile Rd.	Penthouse Theatre	Gorelick Bros.
17344 W. 7 Mile Rd.	Adult Book Store	Charles Cobb
13148 W. 6 Mile Rd.	Adult Book Store	Sheldon Hootner

Total 14

East Side Area:

14321 Harper	Merit Books	D'Angelo-Marrone
13914 E. Jefferson	Moulin Book Shop #1	Slymon Hakim
14271 Harper	" #2	"
12719 Gratiot	Guild Theatre	Albert Degel
14259 "	Mini Book Shoppe	Frank Julian
13898 E. 8 Mile Road	Adult City Books	Charles Bauer
7706 E. 7 Mile Rd.	Nortown Theatre	Nortown Theatre, Inc
10321 Van Dyke	Sarra's Emporium	Sara Gamble

Total 8

It should be noted that a number of the listed establishments are operated by the same persons or corporations.

/s/ Paul Smith
Patrolman
Badge #1682
Obscenity Detail
Liquor License Unit

EXHIBIT 3

(A 112)

Affidavit of William P. Walsh

State of Michigan,
County of Wayne—ss.

William P. Walsh, being first duly sworn, deposes and says:

1. That he is a lifetime resident of the City of Detroit, Michigan, attended the University of Detroit, and has been actively involved in the real estate business since 1950 as a member of the Frank R. Walsh Company, and the George W. Drennan Company; that he is presently President of the William P. Walsh Company, President of Urban Dynamics, Inc., Vice President of Dreker, Inc., Investment Counselor, Trust Manager and Fiscal Agent for Midwestern Real Estate Trust; member of the Commercial Development Committee of the Urban Development Council of the Greater Board of Commerce; Broker member of the Detroit Real Estate Board; Member of the Michigan Real Estate Association, the National Association of Real Estate Boards, and the American Right of Way Association.

2. That he has been actively involved in and has extensive experience in property management brokerage, appraisal and consulting work, and appraisal review work,

and is frequently engaged as a consultant on values for purchase or sale of real estate.

3. That his general appraisal and consulting services have been rendered to the following clients:

Archdiocese of Detroit, Michigan Lutheran College, Allied Supermarkets Inc., Koepplinger Bakery, Federal Department Stores, Pavillion Apartments, Lafayette Towers, Cunningham Limp (A 113) Corporation, Crawford Door Corporation, Standard Oil Company, Sperry Rand Corporation, The Michigan Bank, the Commonwealth Bank, The Detroit Bank and Trust, The Chrysler Corporation and numerous other private individuals and companies, including a number of residential developers, brokers and investors. Included among the legal firms for which work has been done:

Miller, Canfield, Paddock and Stone
Travis, Warren, Nayer & Burgoyne
Levin, Levin, Garvett & Dill
Alspector, Sosin, Mittenthal & Barson
Dahlberg, Simon, Jayne, Woolfendon & Gawne
Raymond, Chirco, Fletcher, Donaldson & Ruwart
Daniels, Zussman, Wienner & Seel
Moll, Desenberg, Purdy, Glover & Bayer.

4. That his general appraisal and consulting services have been rendered in the following Michigan cities:

Detroit, including the following projects: Corktown Redevelopment Project, Lafayette Project, Central Business Project I, III and V known as Skid Row, Greektown and the Kern's Block, Medical Center Projects I & II, Elmwood Park Projects, I, II & III, University City Projects I & II, West Side Industrial Projects I & II, Wholesale Distribution Center, The Port Development Project and North In-

dustrial Project, Milwaukee Junction Rehabilitation Project II, Urban Mass Transportation Project I & II.

Flint, Jackson, Lansing, Kalamazoo, Port Huron, Mt. Clemens; Wyandotte, St. Clair, St. Clair Shores, Centerline, Clawson, Muskegon Heights; Warren, Westland, Southfield, Saginaw, Lincoln Park, Ferndale, Wayne, Garden City, Inkster, River Rouge, Hamtramck.

(A 114) 5. That Urban Renewal Studies made in several of the aforementioned cities included the following services:

Acquisition Appraisals
Appraisal Reviews
Special Consulting Work
Land Utilization and Marketability Studios
Land Disposition or Reuse Appraisals
Transient Housing Studies
Public Housing Turn Key Projects
Low Income Housing Studies.

6. That his general appraisal and consulting services have been rendered in making right-of-way studies for the Michigan State Highway Department, and the Wayne County Road Commission.

7. That he has qualified as an expert in the following courts:

United States Federal District Court
United States Tax Court
Wayne County Circuit Court
Wayne County Probate Court
City of Detroit Recorder's Court
Oakland County Circuit Court
Crawford County Circuit Court
St. Clair County Circuit Court
Otsego County Circuit Court
Macomb County Circuit Court.

8. That within the Institute of Urban Dynamics, he has done extensive work in the study and analysis of Urban, Physical, Social and Economic systems in order to initiate normal sponsorship for effective remedial programs and to develop methods for the successful transfer of programs which have proven to be productive in other communities.

9. That from his experience he is convinced that regulation of certain uses of property is necessary to preclude (A 115) their concentration in business or residential areas in order to avoid depreciation of property valves, large scale exit of residents and businesses, and a resulting blighting effect on neighborhoods.

10. That certain businesses, such as bars, motels, pawn shops, taxi dance halls, etc., were correctly classified as "regulated uses" in Section 66.0000 of the Official Zoning Ordinance of the City of Detroit in 1962, which prohibited their locating within 1,000 feet of each other, as these businesses when clustered together have a debilitating effect on the surrounding neighborhood.

11. That these businesses, and others like them, which cater not to the needs of the immediate neighborhood, but attract customers from outside the neighborhood, and which serve transient residents, create a concern and even hostility in the minds of the persons living and working nearby and, in fact, act as a deterrent to prospective buyers of businesses and residences within the area.

12. That these persons who are prospective buyers in the neighborhood as a matter of course investigate the surrounding business area referred to as the "perception area" by the real estate business to determine the stability and viability of the neighborhood.

13. That prospective residential buyers will refuse to consider homes in the neighborhoods where the immediate adjacent business district (the perception area) supports businesses such as those mentioned above which are usually (A 116) associated in the minds of the prospective buyers with unstable and declining property values.

14. That when it first appears that these types of businesses are beginning to cluster in a neighborhood, those nearby residents and businessmen who can afford to move will immediately offer their property for sale, and assume any financial loss rather than gamble on the anticipated decline in property values; that the anticipation whether or not warranted in fact is sufficient to and does cause the property owners to flee the area; that the appearance of more than one or two vacant store fronts or "For Rent" signs in a business district, creates an apprehension in the minds of the prospective buyers who reject the neighborhood as being unstable; the property remains vacant and prices inevitably decline. That other neighboring residents and businessmen recognizing the situation realize that their property values are in jeopardy, and so offer their homes and businesses to "get out while the getting's good;" that the resulting surplus of properties offered on the market causes a further decline in sale prices, that a home which would sell for $45,000.00 outside the City of Detroit is sold with difficulty at a loss of almost half of that amount in these declining neighborhoods.

15. That a purchaser who buys a home at the reduced sale price more often than not is unable, because of his income bracket, to maintain the home he has purchased at the reduced rate.

(A 117) 16. That the City of Detroit by adopting the Zoning Law which prohibits clustering of these regulated

uses is an effective tool to prevent the process of deterioration of neighborhoods as described above; that the location of adult types of entertainment; i.e., adult book stores, adult motion picture theaters and cabarets which offer topless dancing, etc., are inimicable to the stability of a neighborhood, particularly because of the fact that they too cluster together, and within a very short time create in the minds of the adjacent residents and businessmen the same concern and hostility which is evoked upon the appearance of the other businesses classified as regulated uses.

17. That the appearance of one or more businesses offering adult types of entertainment causes the reaction described above and from experience it is known that the decay process in the neighborhood is iminent.

18. That the location of adult types of businesses must be regulated as are other "regulated uses," in order to avoid the inevitable exodus from neighborhoods caused by the cluster of these types of businesses.

/s/ William P. Walsh

Subscribed and sworn to before me this 23rd day of April, 1973.

/s/ Rosemary Yurik,
Notary Public, Wayne County, Michigan
My commission expires July 26, 1976

EXHIBIT 4

(A 118)

Affidavit of Ogust Mai Stewart

State of Michigan,
County of Wayne—ss.

Ogust Mai Stewart, being first duly sworn, deposes and says:

1. That she resides at 16950 Normandy at Six Mile Road in northwest Detroit; that she is co-owner, with her husband, of the American United Real Estate Corporation, located at 13725 West Eight Mile Road, 1½ blocks west of Schaefer, in the City of Detroit; that she has been located at this business address for 3½ years; that she obtained her B.A. (Magna Cum Laude) Degree from Clark University, Atlanta, Georgia, in 1946; that she did postgraduate work at Wayne University in 1947 and 1948, and at the University of Michigan in the Summer of 1948; that she taught English at Northwestern High School from 1954 to 1967; that she had been active in the real estate field for 5½ years.

2. That the West Eight Mile-Schaefer business community where my business is located is comprised, generally, of banks, supermarkets, restaurants, typical gasoline stations, and other related service stores. On the east side of Schaefer, near Eight Mile, is Blackstone Manor, a 300 unit co-operative. The homes, generally, are a combination of brick, single family residences, including colonials, ranches, bungalows, ranging from $18,000 to $40,000. Many homes located in the Outer Drive-Penmbroke area range even higher.

(A 119) 3. That during the past nine months, several pornography businesses have invaded the West Eight

Mile-Schaefer Road area. Included in this number are two book stores, a theater and, most recently, a Studio offering live girls as models in a shop entitled: "Auroral Morning," which has been raided by the Detroit Police Department several times. This two block strip is ablaze with multi-colored expensive neon signs that publicize a variety of offerings. Shock, disgust and utter disbelief at the influx of this kind of business compels me to file this affidavit.

4. In the immediate strip, private parking is grossly limited. In the block between Lesure and Tracey our company, American United Real Estate Corporations, owns the only private lot in the block. The pornography businesses are attracting predominantly migrant, middle age persons, driving expensive cars, who use our lot as there is not sufficient street parking.

5. I cannot prove the point, but I am inclined to believe that some prurients' shops tend to draw sex deviates. Recently, the owner of the small delicatessen next door, Mr. Thomas Lumpkin, related to me the following incident: Karen Simpson, a sixteen year old daughter of his friend, (daughter of Mr. and Mrs. Ralph Simpson of Lesure Avenue), a week ago, ran into his store in an attempt to escape from a male who had been riding on a bus with her to this area. Karen Simpson stated that she had been accosted by this person, and pointed him out. Mr. Lumpkin later observed the person going into one of the porno shops.

Further, Mr. Lumpkin and his sales assistant, Dorothy Wheeler, have on three occasions removed lewd pictures (A 120) from 8 and 9 year old boys and girls, who buy candy and chewing gum in his store. These children stated: "We found these pictures on the ground outside."

6. Despite the fact that the community has not picketed nor publicized to a great extent their incense over the

invasion of these stores does not mean they are not terribly concerned over the impact these businesses have on the neighborhood—the attraction of undesirable persons and the turning away of desirable potential buyers. As a businesswoman who has felt the pulse of this community for 27 years, and has talked with such community leaders as Earl and Marie Bass, of the Schaefer-7 Mile Block Club Community Council, I am willing to state that this situation is becoming increasingly explosive.

7. I contacted the Mayor's Office and the Office of the Corporation Counsel early this year, and was told that if these businesses had located here prior to November 2, 1972, and were properly licensed at that time, they were non-conforming uses under the new zoning laws, and the City could not interfere with their operation, so long as they complied with the law.

8. It has been my experience in dealing with people interested in buying or leasing property that they first carefully check the type of businesses already located in the area. Certain kinds of businesses, particularly those which clearly serve the needs of the immediate neighborhood, will evoke an adverse reaction from the prospective buyer who believes that these businesses indicate a declining neighborhood. Prospective (A 121) clients are especially fearful if several of these kinds of businesses are grouped together. The grouping of the pornography businesses in our area is the cause of prospective buyers rejection of this area as a a possible area for their relocation. For example, a young doctor recently told me he would not consider this Eight Mile strip for his new clinic because of the porno businesses nearby.

9. Legitimate business properties are definitely being depreciated in value. Appraisals by mortgage companies,

banks and private lending institutions determine the economic status of property not only by cost value but most certainly by comparable values. The value of my building is determined not merely by structural soundness but also by location. The value of my building is greatly decreased now as a result of the influx of pornography businesses which have recently mushroomed in our area.

/s/ Ogust Mai Stewart

Subscribed and sworn to before me
this 23rd day of April, 1973.

/s/ Rosemary Yurik
Notary Public, Wayne County, Michigan
My Commission expires July 26, 1976.

EXHIBIT 5

(A 122)

Carl H. Schmidt Company
18405 W. Eight Mile Road
Detroit, Michigan 48235

BRoadway 3-8500

August 11, 1972

Honorable Roman S. Gribbs
MAYOR—CITY OF DETROIT
Executive Office
2 Woodward Avenue
Detroit, Michigan

Dear Mayor Gribbs:

After living my entire life in the city of Detroit (personal & business) I have reached a difficult decision—namely, I am moving the Carl H. Schmidt Company out of Detroit. I have intense personal loyalty to the City of Detroit, but I must be practical—here are the reasons:

1) The Uptown Book Store is operating an adult book store at 16401 W. 8 Mile—right next door. They have pornography available in their back room, and it is disgusting—and we have no desire to be this close to it or the people frequenting this store. You might remember some time ago that the neighborhood rose up and were able to prevent an adult movie house from opening up on the other side of our building because of zoning requirements—but apparently there is nothing on the Detroit books to stop this adult book store.

2) Our office has been broken into and robbed on 4 different occasions, and my car parked behind the building once—the financial and business time lost have truly hurt.

3) Detroit has a corporation tax and personal income tax, plus several other taxes which do not help the matter—although they are not the main factor.

Therefore, primarily because of the adult book store, we are leaving Detroit—we are a relatively small business and I am sure you are not going to lose any sleep over our move tonight—but we just wanted to keep you tuned in on what is going on around Detroit and hope that maybe you (A 123) can take action so as to prevent things like this in the future.

Sincerely,

/s/ Carl H. Schmidt, Jr.
CHS/paw

CC: Mel Ravitz
President—Common Council
CITY OF DETROIT
2 Woodward Avenue
Detroit, Michigan

CC: Mr. and Mrs. George LeVerge
20012 Archdale
Detroit, Michigan 48235

(A 124)

ANSWER FROM MAYOR GRIBBS

September 21, 1972

Mr. Carl H. Schmidt, Jr.
Carl H. Schmidt Company
16405 W. Eight Mile Road
Detroit, Michigan 48235

Dear Mr. Schmidt:

I was disturbed upon receiving your letter which indicated that you are planning to move the Carl H. Schmidt Company out of Detroit. At the same time you indicate an obvious interest in the welfare of this city.

I assure you that I share in your concern regarding the adverse effects that businesses such as adult bookstores have on adjoining businesses in communities such as yours.

As you probably know, I have organized as an adjunct to my office a Task Force on Licensing Procedure to attack this problem. Staffed with key representatives of the departments concerned with public health, safety, legal procedure, enforcement and licensing, it has as one of its responsibilities the review, enforcement and strengthening of our existing municipal codes in regard to legally defined obscenity and pornography.

The Task Force has recently submitted to the Common Council a package of sweeping new proposals to regulate and control adult bookstores and theaters. In addition, court cases from all areas of the country are being reviewed to assist in establishing effective enforcement of obscenity ordinances.

We are hopeful that these actions will alleviate the problems that these types of businesses create for the residents and businessmen in the Detroit community.

I am hopeful that your decision is not final. To this end, I am dispatching an executive member of the Mayor's Committee for Industrial and Commercial Development of the Community Development Commission to meet with you personally to discuss our plan to abate this public nuisance.

Sincerely

Mayor

RSG:sjh

EXHIBIT 6

(A 125)

AFFIDAVIT OF GAIL SHEEHY

State of New York }
County of New York } ss

GAIL SHEEHY, being first duly sworn, deposes and says:

1. That she obtained her B.S. Degree from the University of Vermont in 1958, and studied under Dr. Margaret Mead at Columbia University Journalism School, with fellowship in Interracial Reporting in 1970; that she was a feature writer for the New York Herald Tribune from 1963 to 1966; that from 1966 to 1973 she was a freelance writer, having articles published in Cosmopolitan, McCalls, Glamour, Good Housekeeping, London Sunday Telegraph, and the New York magazine; that from 1968 to the present time, she has been Contributing Editor for New York magazine; that her honors include the 1973 Alicia Patterson Foundation Fellowship Award, and the 1973 Communi-

cations Award for outstanding performance in magazine journalism, and the 1964 Newspaper Women's Club of New York front page award; that her books include *Panthermania: The Clash of Black Against Black in One American City,* Harper and Row, New York (1971), *Speed Is of the Essence,* Pocketbooks, Simon and Schuster, New York (1971); and *Hustling: Prostitution in Our Wide Open Society,* Delacorte, New York, 1973.

2. That she has engaged in extensive research and investigation of the impact of the location of adult entertainment businesses in Manhattan, New York, and has published her findings in the following articles: "Cleaning Up Hell's Bedroom", (A-126) New York magazine, November 13, 1972, and "The Landlords of Hell's Bedroom," New York magazine, November 20, 1972, and "The City Politic, More Questions and Some Answers on Hell's Bedroom," New York magazine, December 18, 1972 (attached hereto); that the facts related therein are true to the best of her knowledge and belief, and as to those matters therein stated to be upon information and belief she believes them to be true.

3. That as a result of my studies, I am convinced that the real battle in the war against pornography is happening in the streets of our cities. The real battle is with the criminalization of the sex business. What follows commercial pornography, which is the meat of the material offered by "adult" businesses, is prositution. What follows prostitution is street crime, and what follows the crime reports is the demoralization of the legitimate businessmen and the drying up of the tax bases of our cities.

4 That I have watched the sequence repeat itself in three different Manhattan neighborhoods over the last few years. First appears the dirty book store. Everyone is curious yellow. Next follows the coin-box peep show. It is

cause for a lot of bad jokes and Adults Only guffaws. One day a live sex show sprouts from a storefront, then a massage parlor, then two massage parlors and a pornographic movie, two pornographic movies and a prostitution hotel, and suddenly the marginal hustlers smell a rich new source and multiply and begin swarming out of the woodwork like roaches. The porno chic crowd is offended and moves on. The neighborhood is left in the grip of Mafia-backed massage parlor and hotel operators, Murphy men, cruising pimps, prostitute muggers, youth gang ripoff artists and the addicts who lie in (A 127) wait for any of the above, until they accumulate enough cash, and then jump them for a fix.

5. That my investigation shows that the landlords of the buildings where these adult entertainments are located live outside the Borough of Manhattan, and have no concern over the deterioration of the neighborhoods; that the man who brought us the pornographic film, "Schoolgirl," recently seized by the F.B.I., in various cities, had this comment when asked if he saw any connection between pornography and street crime, "That's the biggest bunch of crap. Carl Pomeroy, author of all the Kinsey books, he went all over the country to interview sex offenders. In no case were they interested in pornography." When I explained that my reference was not to sex crimes stimulated by pornography, but to the crime generated in neighborhoods that become centers of commercialized sex, and asked if he were concerned about the street crime in his city, he responded: "My home is in Hallandale, Florida." And then he began his pitch: "I'm a capitalist. I'm in a business where I can't survive if people don't come to my theaters . . . " He ended by cloaking himself in Constitutional piety: "There's no such a thing as a little pregnant. Censorship will just spread. People should have a right to

pay their money and see these pictures—that's the Americay way."

6. The real estate moguls of our cities don't care. When questioned, they plead that pornography tenants are too lucrative to resist.

(A 128) 7. Europe has grasped the real issue. The current rush of campaigns to halt the exploitation of pornography in Sweden, Denmark, West Germany, France, Britain and Italy is prompted not by a new Puritanism. It stems from street experience with criminality and drug peddling spawned by Europe's sex markets. Copenhagen officialdom has expressed concern about creeping underworld control of their capital. Even in West Germany, home of the legalized "sex supermarket" concept, authorities have recently mounted a stiff campaign against pornography and massage parlors. None of West Germany's cities which attempted to restrict prostitution to specific areas has been successful. Eros Center, Hamburg's six-year-old model segregated red light district, was expected to inspire copies in this county. But a funny thing happened just outside the enlightened Eros Center. Crime, violence and the number of pimp-controlled prostitutes all *increased.*

8. It is too easy to be a knee-jerk civil libertarian these days. If we don't sit up and face the real issue of criminization behind the boom in commercialized sex, our cities may soon be dancing their last tango.

9. In my opinion, therefore, it is imperative in order to preserve the stability of our neighborhoods to regulate adult businesses, not by relegating them to one particular zone, but by limiting the number and kind of adult businesses which may locate in any one area. It is only by

such regulation that the concentration of these businesses can be avoided, and the resulting street crime and deterioration of neighborhoods can be eliminated.

/s/ Gail Sheehy

Subscribed and sworn to before
me this 18th day of April, 1973.

/s/ Velma H. Dingle
Notary Public, Isle of New York
No. 31-6039350
Certification———————————
My Commission Expires March 10, 1974.

(A 129)

New York Magazine

December 18, 1972

THE CITY POLITIC

By Gail Sheehy

More Questions And Some Answers on Hell's Bedroom

Like many others, I applauded those civil libertarians in the sixties who defended our right to see *Oh! Calcutta!,* read Ralph Ginzburg's magazines and watch Lenny Bruce in a nightclub. I have no objection to people in the privacy of their homes watching a porno movie in the company of a naked puma.

Fine. But the Constitution is not a suicide pact. And things have changed. I have seen with my own eyes that street prostitution and public pornography attract criminals, generate crimes with real victims, subvert honest

policemen, demoralize legitimate businessmen, and veil a much deeper social problem than most people seem willing to face. I am the sort of person who believes that prostitution and pornography could not exist on the grand scale they have attained in midtown without the complicity of criminals (organized and otherwise), greedy landlords, and indifferent or venal public officials.

What we are seeing today in this city—indeed every major city—is the *criminalization* of prostitution and pornography. With every belly dancer on Bourbon Street or street pross on Eighth Avenue, there follow probably three junkies, a dozen ripoff artists and marginal hustlers, a fleabag hotel or massage parlor operator, in some cases a Mafia protection man, and always a pimp. Therefore—and let's set this straight once and for all—the struggle against big-city pross and porn is not a blue-noser's battle against sexual liberation; it is a war against crime of the rankest kind. If we lose, then legitimate businesses, frightened tourists and maybe even some of *us* will flee, our city's tax base will dry up and the city's luck will finally run out.

Well, we have to make our own luck. To that end, there are some people I'd like to ask more questions in the wake of my article, "The Landlords of Hell's Bedroom" (November 20):*

• • • • •

* N.B. The remainder of this Article and "The Landlords of Hell's Bedroom" are omitted here.

EXHIBIT 7

(A 140)

New York Times

December 18, 1972

DRIVE ON SMUT AIMS AT BUILDING OWNERS

By Edward Ranzal

The city broadened its anti-smut campaign in the Times Square area yesterday, moving against owners of buildings where peep shows operate. Heretofore, the city has acted only against the operators of peep shows.

Armed with a recent state Supreme Court decision requiring peep shows to have a city license, the Corporation Counsel, Norman Redlich, filed an action in Civil Court against the York Amusement Corporations, owners of a building at 1487 Broadway, near 43d Street, that houses a peep show.

At the same time, the owner of the peep show, Martin J. Hodas, whom law enforcement officers described as the "King of Peep Shows," was served in the action, returnable in 10 days. If found guilty, the owners and operators could be fined up to $100 a day for every day the peep show operates without a license.

Mayor Lindsay said that similar action would be taken against other peep-show premises, adding:

"For the first time we are moving not only against the peep-show operators, but also against the realtors who permit their buildings to be used for these shows.

"Other realtors with peep-show operations are on notice that they face similar legal action in the near future."

City officials said the new step was primarily an economic threat against property owners who allowed operation of peep-shows. The officials said many (A 141) land-

lords permitted the illegal operations to exist because of the exorbitant rents they got.

The move by the city was prompted by a recent decision by State Supreme Court Justice Myles J. Lane, who held that a peep show was in fact public amusement and therefore had to be licensed by the city's Consumer Affairs Department.

About 20 of the 50 peep-show operations in the Times Square area have closed since the ruling rather than apply for $100-a-year licenses, which also require the answering of a questionnaire that inquires into criminal convictions. Several operators have applied, but the Consumer Affairs Department said it had not yet granted any licenses.

No explanation was given why Mr. Redlich's office decided to move first against the York Amusement Corporation. The owners were————————————through their agent, Helmsley-Spear, Inc.————————————

————————————are coin-operated machines. For 25 cents a viewer can see about a two-minute segment, with a view of the entire film costing several dollars.

"My administration," Mayor Lindsay said, "will continue to work every possible way to make Times Square a safer and more desirable place for visitors, entertainment and business."

The antismut drive has focused thus far on massage parlors, narcotics traffickers and places of prostitution. Eight hotels in the Midtown area have been closed this year as part of the cleanup.

The police raids on so-called massage parlors (A 142) revealed that profits from pornography in the midtown area were far beyond what the police had believed possible. There were also indications that the operators of the parlors might be filming and taping customers' actions for potential blackmail.

The large amounts of cash found on hand—one parlor safe contained $17,000 in small bills—called attention to the fact that legitimate businesses were being driven out of the Times Square area because the "massage parlors" and storefront peep shows were paying double and triple the rent that legitimate businesses could afford.

Seymour Durst, the head of the Durst Organization, a large real-estate enterprise that is trying to drive pornography out of the midtown area, has stated that he had been offered $1,000 a month for small stores that he rented to little eating places for $500 a month.

"Peep shows," he said, "can pay a very high rent, and some property owners have figured that the only thing that will carry the property is porno."

EXHIBIT 8

(A 143)

Affidavit of Lino Canevaro

State of Michigan
County of Wayne—ss.

LINO CANEVARO, being duly sworn, deposes and says that he is a Head Planner with the City Plan Commission of the City of Detroit and that he has worked for the City Plan Commission for 16 years. Deponent further says that he is a graduate of Michigan State University, B.S., Wayne State University, M.A., (Urban Planning); that he is a member of the American Institute of Planners, the

American Society of Planning Officials, and the American Society of Landscape Architects; that he is a registered Community Planner and that he had previous employment with the United States Federal Government as a Planner for a period of four years.

Deponent further says that he was one of the participating authors of a book called "The New Zoning", edited by Norman Marcus and Marilyn Groves, published by Praeger Publishers, 1970.

Deponent further says that he was in charge of the drafting of the present Zoning Ordinance of the City of Detroit and is familiar with all of the studies made in the preparation of the City Zoning Ordinance.

Deponent further says that there are certain problems in urban living in a community the size of the City of Detroit that makes it necessary to place certain controls on various phases of land uses that are considered to be incompatible with or have an adverse effect on the stability and desirability of living areas. It has been my experience (A 144) and others in this field that certain commercial and transient residential uses have a high degree of tendency to blight surrounding neighborhoods and other uses in close proximity. When a number of these uses congregate in close promixity to each other, the possibility of creating blighted conditions increase.

The commercial uses which have a tendency to create blighting conditions include: bars, pawn shops, pool or billiard halls, shoeshine parlors, taxi dance halls, secondhand stores, adult book stores, adult movie theatres, and cabarets. The transient residential uses with this same potential includes: public lodging houses (flop houses) motels, and hotels.

When the right mixture of these uses are concentrated in a small area, we have what is commonly called a "Skid Row" area.

Aside from the deleterious appearance usually associated with this type of area, numerous social problems are also generated by "skid rows". These include the alcoholic, the drug addict, prostitution, crime, low rent housing for the single adult attracting senior citizens on a fixed income, the mission church, food kitchens, pan-handlers, and generally an assembly point for all the human derelicts of society.

In order to prevent the establishment of these types of areas, the Common Council recommended that the City review the location for those types of business and housing associated with "skid rows."

Deponent further saith not.

/s/ Lino Canevaro

Subscribed and sworn to before me this 23rd day of April, 1973.

/s/ Lena Bommarito
Notary Public, Wayne County, Michigan
My Commission expires. July 20, 1975

(A 145)

APPENDIX K

ANSWER TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND AFFIDAVIT IN SUPPORT THEREOF

(U. S. District Court—Eastern District of Michigan—Southern Division)

Nortown Theatre, Incorporated, a body corporate of the State of Michigan, Petitioner, vs Roman Gribbs, Mayor of the City of Detroit, et al, Defendants, jointly & severally.	No. 39796

Now Comes the Petitioner, Nortown Theatre, Inc., by and through its attorneys, Stephen M. Taylor, Esquire, and Robert Eugene Smith, Esquire, and moves this Honorable Court to deny defendants' Motion for Summary Judgment for the following reasons:

1. That the opposing parties have failed to state a defense upon which relief can be granted and/or in the alternative, the opposing parties have failed to state a valid defense to claim stated against them.

2. That defendants' Motion for Summary Judgment and the Affidavits attached thereto fail to specify any facts upon which their motion can be based; that there is a genuine issue of fact in the matter before the Court; that in the alternative taking all of the facts specified in the Affidavits submitted by the defendants in their Motion for Summary Judgment to be true, defendants are (A 146) not entitled to Summary Judgment.

3. That in the alternative taking all of the facts specified by defendants in their Affidavits attached to their Motion for Summary Judgment, as true, Petitioner is nevertheless entitled to a Judgment as a matter of law.

That this Answer is based on the Affidavit of James C. Rodgers and the Memorandum filed in support of Petitioner's Complaint and the Memorandum of Law attached hereto and filed in response to defendants' Motion for Summary Judgment.

Respectfully submitted,

By: /s/ Stephen M. Taylor
Attorney for Petitioner
1500 First National Building
Detroit, Michigan 48226
962-3302

(A 147)

Affidavit

State of Michigan
County of Wayne—ss.

James C. Rodgers, being first duly sworn, deposes and says:

1. That he has been actively involved in the real estate business since 1936 and is licensed as a real estate broker in the State of Michigan; that he is presently President of Rodgers & Associates, Inc., located at 25805 Harper Ave., St. Clair Shores, Michigan; that he is a member of the following professional associations:

American Institute of Real Estate Appraisers

Society of Real Estate Appraisers—Senior Real Estate Analyst—Past President of Greater Detroit Chapter

American Society of Appraisers—Past President of Detroit Chapter

American Right of Way Association

Macomb County Board of Realtors

Detroit Real Estate Board

Michigan Real Estate Association—National Asociation of Realtors

American Arbitration Association

2. That he has been actively involved in real estate appraisal and consulting work since 1947, in and about the Detroit metropolitan area and the State of Michigan.

3. That his appraisal and consultant services have been retained by the following:

Equitable Life Assurance Society, Acacia Mutual Life, Connecticut General Life, Ohio Mutual Life, Standard Accident Insurance, Reliance Insurance, Insurance Co. (A 148) of North America, United States Fidelity & Guaranty, Maccabees Mutual, State Life of Indiana, Manufacturer's Life of Canada, Midland Mutual, Aluminum Co. of America, Brown & Williamson Tobacco, Chrysler Corporation, City of Warren, Colonial Federal S & L Ass'n., Consumers Power, Detroit Federal S & L Ass'n, Detroit Board of Education, Detroit Corporation Counsel, Detroit Housing Commission, Detroit Bank & Trust, Detroit Edison, Edward Henkel Realty, FHA, Ford Motor Co., Fraser Board of Education, General Motors Corp., Hoffman & Hoffman, Honeywell, Homequity, IBM, Koppers,

Liberty State Bank, Michigan Bank, Michigan Bell Telephone, Michigan Department of State Highways, Mt. Clemens Housing Commission, National Bank of Detroit, Owens-Illinois, Palmer Osteopathic Hospital, Proctor-Homer Warren Co., Simone Corp., 3M, TI Home Transfer, VA, Warren Consolidated Schools, Wayne County Road Commission, Warner-Lambert Pharmaceutical Co.

4. That he has qualified as an expert witness and has testified before the following Courts:

City of Detroit Recorder's Court

Wayne County Circuit and Probate Courts

Oakland County Circuit and Probate Courts

Macomb County Circuit and Probate Courts

Lapeer County Probate Court

U. S. District Court—Eastern District—Southern Division.

5. That market value appraisals have been prepared and made for:

Buyers, sellers, employee transfer, mortgage loans, insurance, probate of estates, federal inheritance and gift taxes, federal income tax, partial and whole takings under 'right of eminent domain' for highways, electric transmission lines, schools, urban renewal programs, parks, and miscellaneous municipal requirements.

6. That he has appraised the following kinds of property:

Single to four family residential, multi-family residential condominiums, co-operatives, motels, mobile

home parks, commercial, stores, service stations, auto wash, light and medium industrial, outdoor advertising, bowling alleys, churches, schools, city hall, athletic field and stadium, professional and general office buildings, (A 149) vacant (residential, commercial and industrial) lots, subdivisions and acreage.

7. That he has read the Affidavits of Mel Razit, William Walsh and Ogust Mai Stewart; that each Affidavit pertains to the negative reactions of persons to the use or occupancy of adjacent real estate; that none of the Affidavits contain any evidence of reduced market value of abutting properties due to the establishment of so-called "adult" book stores or theatres and the negative attitudes engendered thereby.

8. That there are many factors which have tended to, and will continue to, reduce property values in the City of Detroit; that some of those factors are: racial and socio-economic changes in neighborhoods; real estate financing; outmigration of people as well as business and industry; crime; city income tax; a defunct school system, etc.; that with all of these various factors, he does not believe it can be said that the establishment of an "adult" bookstore or theatre has, or will, destroy a neighborhood or the values of the properties therein; that none of the Affidavits—and specifically the Affidavit of Mr. Walsh—provide any data as to the "before and after" values of properties where these "adult" use businesses have been established.

9. That he has reviewed records and data of the *United Northwestern Realty Association Western Wayne County Board of Realtors* (that a photocopy of same is attached hereto and made a part hereof);* that the list of sales in

* Omitted in printing.

section No. 1, covering the area from Purtian Avenue north to Eight Mile Road and from Greenfield Avenue east to Woodward Avenue, provide the following data:

(A 150)

Year	*Period*	*Average Sale Price*
1971	12 mo	$20,853.00
1972	12 mo.	$21,427.00*
	*Increase 1971 to 1972	2.8%
1971	Jan. 1 to April 30	$20,669.00
1972	Jan. 1 to April 30	$20,979.00
1973	Jan. 1 to April 30	$22,273.00*
	*Increase 1971 to 1972	1.5%
	*Increase 1972 to 1973	6.2%
	*Increase 1971 to 1973	7.8%

That these figures are provided to indicate that the general area, wherein "adult" stores and theatres are located at Schaefer Road and Eight Mile Road in the City of Detroit, has shown an increase in residential values over the past two to two and one-half years, in spite of the general deteriorating nature of all commercial property values along the so-called "section line" and "mile road" strip commercial frontages in the same geographical location.

10. That he has personal knowledge of the Eight Mile Road—Schaefer area in the City of Detroit; that his firm has appraised eleven of forty units in the Norfolk Village Condominium with units fronting on Schaefer as well as on Norfolk Court; that Norfolk Court is the first street south of Eight Mile Road and intersects with Schaeffer Road; that these appraisals were completed in February, March and April of 1973; that these "condominiums" were first offered for sale in February 1973 and to date (June 4,

1973) thirty-five of forty units have been sold; that based upon his experience and expertise as an appraiser and real estate broker, the number of sales (thirty-five out of forty) in a brief four month period clearly indicates the visibility of the location.

11. That Norfolk Court Condominium is a part of the Blackstone Manor Apartment complex of 350 to 400 units built (A-151) about 1948; that in 1968 most of the complex was converted to the Blackstone Apartments Co-Operative; that all units (except those later converted to the Norfolk Village Condominium) were sold to buyers on a co-operative basis; that upon information and belief, there is a waiting list of persons for these co-operative units; that upon information and belief, no prospective purchaser of a unit in the Norfolk Village Condominium has made any mention of negative use and occupancy factors along Eight Mile Road that would deter purchase.

12. That based upon his experience and expertise as hereinabove stated, your Affiant states that an in-depth objective study of other residential property sales in the immediate area of Eight Mile Road where these "adult" use properties exist would show no perceptible indication of negative market price activity on a "before" and "after" basis; that if lower prices were obtained that the various reasons or factors, as hereinabove mentioned, would provide the true cause of same.

Further deponent sayeth not.

/s/ James C. Rodgers

Subscribed and sworn to before me
this 7th day of June, 1973.

/s/ Mary T. Korn
Notary Public, Wayne County, Michigan
My commission expires: 9-18-75

APPENDIX L

PARTIAL TRANSCRIPT (pp. 28-32) OF PROCEEDINGS AT ORAL ARGUMENT ON MOTIONS FOR SUMMARY JUDGMENTS, IN NORTOWN AND AMERICAN MINI THEATRES CASES, ON SEPTEMBER 17, 1973, BEFORE THE HONORABLE CORNELIA G. KENNEDY AND HONORABLE LAWRENCE GUBOW

• • • • •

Mrs. Reilly: Finally the argument seems to be raised time and time again that what we are trying to do is circumvent the First Amendment and prohibit "all kinds of material" which the City deems to be obscene without actually taking the material to trial. It's interesting now that the Miller decision has come down that the description of obscenity is very closely aligned to the definition of adult material as it is set forth in our ordinances; and yet we do not claim that these definitions are the same as the Supreme Court's definition of obscenity. What we have tried to do in enacting these new regulations (A 195, Tr 29) is avoid an adverse effect on our neighborhoods, an adverse effect we see time and time again recurring. We know now that the Court has said that any material which is proven to be obscene may be entirely prohibited; and yet we must be realistic and face facts. It is only after such movies as "Deep Throat" are actually found to be obscene that they may be prohibited. Until that time, when there is a trial on the merits and a decision, a final decision, that material may be disseminated at random and at the will of the person who is operating the theatre or the book store. As the Court knows, on September 13 of this year, "Deep Throat" was ruled not obscene only because the Court held that

our laws presently are insufficient but that the movie itself was, in the opinion of the judges, obscene. So "Deep Throat" continues to be shown. The concern of the neighborhood over the showing of this kind of movie has been evidenced time and again by picketing, by calls and letters to our office, to the Mayor, to the Common Council and so on. I have affidavits here from the man, Doctor Crockmaw, who is immediately adjacent to the Variety Book Store. He has constantly been calling me and saying, "When are you going to help me out? I am losing customers." The fact is that if we do not in some way control the dissemination of what we describe as adult material, it can (A 196, Tr 30) and it has adversely affected our neighborhoods. And the City must take some kind of action. It cannot sit back and wait until this material is finally determined to be obscene or not.

Sometime ago when I first became involved in this lawsuit, I went with some of the obscenity unit police officers to one of the downtown book stores. The first shelves that appear facing the front door when you walk in offer a variety of pocket books which run the gamut of the typical pocket books offered in any drug store. But on the opposite side of that shelf and all the other area which is open to the public, although there is a sign, "Adults Only Permitted Behind This Shelf", is covered with—I would say each shelf covers maybe ten magazines across and five rows down; so each shelf would accommodate 50 separate magazines; and there were approximately five of these large shelves which presented material to the public. Five times 50 is 250 different kinds of magazines and they deal with everything from masturbation to sodomy, flagellation, et cetera, all of the kinds of materials which the Supreme Court says may be ruled obscene. And yet we know that

until these kinds of magazines are taken to court one by one, on a piecemeal basis, there is no way that we can stop the sale or dissemination of this kind of material.

(A 197, Tr 31) Judge Gubow: Doesn't that lend credence to the argument that you are here attempting to do indirectly what you cannot do directly through the obscenity statute?

Mrs. Reilly: No, your Honor. I'll explain why. I laughingly refer to cases on this side—I would use the board, but it seems to have been used—we offer Dick and Jane books to the first grade; then we go up to "Rebecca of Sunnybrook Farm"; then they go to "Catcher in the Rye"; then they go to "Playboy"; then they go to the more explicit sexual kinds of magazines which we are prohibiting here. It is true we cannot do indirectly what we want to do directly if we are not in compliance with the law. But what the court said, the U. S. Supreme Court, in the Miller and Paris Adult Theater case, is that when we are dealing with commercialization in sex, it is a whole new ballgame. And if the City is faced with the actual fact that these kinds of businesses are offering what is truly described as adult material and that adult material is being sold from a business in a commercial enterprise in such a way that it affects the neighborhoods, taking these books piece by piece to court under the obscenity laws is not going to close down the business. Maybe I personally would like to close down the business, but that's not the question here. The (A 1998 Tr 32) City is not attempting to close down the business. The City is attempting to avoid deterioration of the neighborhoods. If "Deep Throat" is cited under a criminal statute and is found to be in violation of the obscenity laws, the owner of the store may be fined or he may be sentenced to jail for a few months; but that does not stop the operation of the business. As I said be-

fore, there may be 250 separate magazines being offered in one book store. Each one in some person's opinion may be obscene. And yet there is no way that the law enforcement officials can take 250 magazines to court and rule they are obscene. And it is common knowledge among those who have worked in this field that even if a magazine is ruled to be obscene, they take the cover off, put a new cover on with a new title, and put it back in the stacks.

Judge Kennedy: What you are saying is that the criminal law won't preserve the neighborhood.

Mrs. Reilly: That's right, your Honor. Thank you. She said it in a nutshell.

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(A 60)

APPENDIX M

STIPULATION TO INCORPORATE BY REFERENCE DEFENDANTS' BRIEFS AND AFFIDAVITS IN NORTOWN CASE, INTO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN AMERICAN MINI THEATRE CASE

(U. S. District Court—Eastern District of Michigan—(Southern Division)

American Mini Theatres, Inc., a Michigan corporation, and Pussy Cat Theatres of Michigan, a Michigan corporation, Plaintiffs, vs. Roman Gribbs, Mayor of the City of Detroit; John Nichols, Police Commissioner of the Detroit Police Department; Michael Glusak, Corporation Counsel of the City of Detroit; Creighton Lederer, Acting Commissioner of the Department of Buildings & Safety Engineering for the City of Detroit; Charles A. Blessing, Director-Secretary of the City Planning Commission, Jointly and Severally, Defendants.	Civil Action No. 40198

It Is Hereby Stipulated And Agreed by and between the above parties, through their respective attorneys, to incorporate by reference Defendants' Briefs and Affidavits filed in Civil Action No. 39796, Nortown Theatre, Inc., v. Roman

Gribbs, Mayor, et al, into Defendants' Motion for Summary Judgment in this cause, also Answer to Defendants' Motion for Summary Judgment, Memorandum in Opposition to Defendants' Motion for Summary Judgment and Memorandum of Law in Support of Complaint.

Goodman, Eden, Millender,
Goodman & Bedrosian
By: /s/ Ernest Goodman
Attorney for Plaintiffs
3200 Cadillac Tower
Detroit, Michigan 48226
965-0050

Corporation Counsel of the
City of Detroit
By: /s/ Maureen P. Reilly
Attorney for Defendants
1010 City-County Bldg.,
Detroit, Michigan 48226
224-4558

Dated: June 25, 1973

(A 62)

APPENDIX N

DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND AFFIDAVITS IN SUPPORT THEREOF IN AMERICAN MINI THEATRE CASE

(U. S. District Court—Eastern District—
Southern Division)

American Mini Theatres, Inc., a Michigan corporation, and Pussy Cat Theatres of Michigan, Inc., a Michigan corporation, Plaintiffs, vs. Roman Gribbs, Mayor of the City of Detroit; John Nichols, Police Commissioner of the Detroit Police Department; Michael Glusak, Corporation Counsel of the City of Detroit, Creighton Lederer, Acting Commissioner of the Department of Buildings & Safety Engineering for the City of Detroit; Charles A. Blessing, Director-Secretary of the City Planning Commission, Jointly and Severally, Defendants.	Civil Action No. 40198

Now come the defendants, Roman S. Gribbs, Mayor; John F. Nichols, Police Commissioner; Michael M. Glusac, Corporation Counsel; Creighton Lederer, Acting Commissioner of the Department of Buildings and Safety Engineering; Charles A. Blessing, Director Secretary of the City Planning Commission, by their attorneys, Michael M. Glusac, Corporation Counsel; Maureen P. Reilly and John

E. Cross, Assistants Corporation Counsel, and in accordance with the provisions of Rule 56 (b) of the Federal Rules of Civil Procedure move this Honorable Court for a Summary Judgment for the following reasons:

(A 63) 1. The Complaint filed by the plaintiffs fails to state a claim against the defendants upon which relief can be granted.

2. That plaintiffs' allegation of a deprivation of Civil Rights by reason of the enactment of allegedly unconstitutional ordinances is without merit in fact and in law.

This motion is based upon affidavits of Dr. Mel Ravits, Sociologist; William Walsh, Realtor; Ogust Mai Stewart, Realtor; Gail Sheehy, Contributing Editor, New York magazine; and Lino Canevaro, Head Planner, City Plan Commission; Exhibits and Briefs in Support of Motion for Summary Judgment, all of which are filed with this court in the records of Nortown Theatre, Inc., v. Roman Gribbs, Mayor, et al, File No. 39796, and incorporated by reference into this Motion for Summary Judgment by stipulation among the parties.

Respectfully submitted,

Michael M. Glusac,
Corporation Counsel,
Maureen P. Reilly,
John E. Cross,
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By: /s/ Maureen P. Reilly

June 26, 1973.

APPENDIX P

LIST OF RELEVANT DOCKET ENTRIES IN NORTOWN CASE

(U. S. District Court—Eastern District of Michigan—Southern Division)

Civil Action No. 39796

1973

Mar. 14. Complaint filed.

Mar. 22. Order to Show Cause regarding Preliminary Injunction.

Apr. 2. Motion for Preliminary Injunction; Hearing; Motion denied.

Apr. 24. Defendant's Motion for Summary Judgment, with Affidavits and Memorandum of Law in Support Thereof, filed.

June 8. Petitioner's Answer to Defendant's Motion for Summary Judgment, Affidavit and Memorandum of Law In Support Thereof, filed.

June 11. Motion of American Civil Liberties Union of Michigan to Intervene as amicus curiae, filed.

Sept. 17. Defendant's Motion for Summary Judgment Heard and Argued before the Honorable Lawrence Gubow and the Honorable Cornelia Kennedy.

1974

Mar. 22. Opinion of the Court filed and entered.

Apr. 25. Order of the Court filed and entered.

May 20. Plaintiff's Notice of Appeal filed and Bond on Appeal in the Sum of $250.00 paid to the Court.

1975

Jan. 9. Brief of Appellant filed.

Feb. 8. Brief of Appellees filed.

Feb. 18. Oral Argument in *Nortown Theatre, Inc.* and *American Mini-Theatres, Inc.*, cases before the Hons. Anthony Celebrezze, Pierce Lively, and George Edwards.

June 16. Opinion of the Court decided and filed.

June 16. Judgment of the Court filed.

July 18. Order Staying Mandate filed.

Aug. 28. Petition for Writ of Certiorari filed with U. S. Supreme Court.

Oct. 20. Writ of Certiorari granted by U. S. Supreme Court.

APPENDIX Q

LIST OF RELEVANT DOCKET ENTRIES IN AMERICAN MINI THEATRES CASE

(U. S. District Court—Eastern District of Michigan—Southern Division)

Civil Action No. 40198

1973

May 1. Complaint filed.

June 8. Appearance on behalf of Defendant filed.

June 8. Hearing on Plaintiff's Motion for Preliminary Injunction.

June 12. Opinion and Order Denying Motion for Preliminary Injunction.

July 16. Defendant's Motion for Summary Judgment filed.

July 16. Stipulation to Incorporate by reference Defendants Briefs and Affidavits filed in Civil Action No. 39796 into Defendant's Motion for Summary Judgment, filed.

Sept. 17. Hearing on Cross Motions for Summary Judgment.

1974

Mar. 22. Opinion filed.

May 22. Judgment filed and entered.

June 5. Notice of Appeal to the Sixth Circuit Court of Appeals by Plaintiff from the Judgment entered May 22, 1974.

Nov. 26. Brief of Appellants filed.

Dec. 23. Brief of Appellees filed.

1975

Feb. 18. Oral Argument in *Nortown Theatre, Inc.* and *American Mini-Theatres, Inc.* cases before the Hons. Anthony Celebrezze, Pierce Lively and George Edwards.

June 16. Opinion of the Court decided and filed.

June 16. Judgment of the Court filed.

July 18. Order Staying Mandate filed.

Aug. 28. Petition for Writ of Certiorari filed with U. S. Supreme Court.

Oct. 20. Writ of Certiorari granted by U. S. Supreme Court.

Supreme Court, U. S.
FILED
SEP 5 1975
MICHAEL RODAK, JR., CLERK

75-3121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,
Petitioners,
v.
AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation,
Respondents.

— — —

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,
Petitioners,
v.
NORTOWN THEATRE, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ROMAN GRIBBS, Mayor of the City of Detroit, et al., Petitioners,

v.

AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation, Respondents.

— — —

ROMAN GRIBBS, Mayor of the City of Detroit, et al., Petitioners,

v.

NORTOWN THEATRE, INC., Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

American Mini Theatres, Inc., Pussy Cat Theatres of Michigan, Inc. and Nortown Theatre, Inc., Respondents, by and through their attorney, Stephen M. Taylor, respond to the Petition for a Writ of Certiorari; filed by Petitioners to review the judgment of the United States Court of Appeals for the Sixth Circuit in the captioned cases.

OPINIONS BELOW

The opinion of the Court of Appeals (App A, pp 15-39 is not reported. The opinion of the District Court (App D, pp 43-60) is reported at 373 F Supp 363.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App B, pp 40-41) was entered on June 16, 1975. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

I.

WHETHER A ZONING AND LICENSING ORDINANCE WHICH DIFFERENTIATES BETWEEN MOTION PICTURE THEATRES BASED UPON THE CONTENT OF THE MOTION PICTURE FILMS INTENDED TO BE EXHIBITED ON THE PREMISES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND CREATES A PRIOR RESTRAINT UPON THE EXERCISE OF FREE SPEECH AND PRESS CONTRARY TO THE PROVISIONS OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitution of the United States

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

§1. Citizenship rights not to be abridged by states.

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On the 2nd day of November, 1972, the City of Detroit enacted Ordinance No. 742-G and 743-G. (App G, pp 65-79, App H, pp 80-84) Section 32.0007 of Ordinance No. 742-G defines the terms "adult book store" and "adult motion picture theatre" as an establishment used to sell or exhibit press materials characterized by an emphasis on matter depicting "specified sexual activities" or "specified anatomical areas". "Specified sexual activities" is defined in that section of Ordinance No. 742-G to mean any sexual conduct or state of sexual arousal. "Specified anatomical areas" is defined in terms of the uncovered made or female genitals, pubic region, buttock, female breast, as well as the covered male genitals in a turgid state. (App G, pp 66-67) Section 66.0000 specifies the reason for, and definition of the term "regulated use" and categorizes certain commercial establishments as falling within the purview of that term, including adult book stores, adult motion picture theatres, Group "D" cabarets, any establishment where intoxicants are sold for consumption on the premises, hotels, motels, pool or billiard halls, second hand stores, shoe shine parlors, etc. Section 66.0000 prohibits the establishment of more than one regulated use within 1,000 feet of each other. (App G, pp 67-68) Section 66.0101 of Ordinance No. 742-G establishes a procedure whereby this prohibition may be waived by the City Plan Commission and establishes the standards to be applied by the City Plan Commission in granting or denying a waiver. (App G, p 68) Section 66.0103 of Ordinance No. 742-G provides that it is unlawful to establish an adult book store, adult motion picture theatre or Class "D" cabaret if the proposed location is within 500 feet of any building containing a residential dwelling or rooming unit. This prohibition may be waived by the City Plan Commission if a petition is filed, signed by 51% of those persons owning, residing, or doing business within 500 feet of the proposed location. Ordinance No. 742-G further specifies that the 1,000 foot prohibition shall not be waived by the City Plan Commission until the requirements of Section 66.0103 have been met. (App G, pp 69-70) Ordinance No. 743-G provides that it is unlawful to operate an adult motion picture theatre (as similarly defined in Ordinance No. 742-G) without complying with the requirements of the City Zoning Ordinance. Further the ordinance gives the mayor the power to refuse to grant or to revoke the license of an adult motion picture theatre. (App H, pp 80-82)

The Nortown Theatre, located at 7706 E. Seven Mile Road, Detroit, Michigan, had been operating as a motion picture since 1938 and had commonly been known in the City of Detroit as the Nortown Theatre for over 30 years and during that time had continuously exhibited motion picture films to the public on the premises. The Respondent, Nortown Theatre Incorporated, met all of the required health, safety and building standards, as specified by the Building and Safety Codes of the City of Detroit and on December 21, 1972, the Respondent obtained a general theatre license to operate a motion picture theatre on the premises. On March 1, 1973, the Respondent began operating the Nortown Theatre.

Respondents, American Mini Theatres, Inc., and Pussy Cat Theatres, Inc., lease and operate respectively a motion picture theatre at 16750 Telegraph Road, Detroit, Michigan. Respondents converted and renovated a corner gas station into a "mini" motion picture theatre and, on December 21, 1972, the building passed all health, safety

and building requirements of the Building and Safety Codes of the City of Detroit. On January 5, 1973, the Respondents began operating the premises as a motion picture theatre.

Soon after commencing operating the theatres, Respondents, Nortown Theatre, Inc., American Mini Theatres, Inc., and Pussy Cat Theatres, Inc., were notified by the Petitioners of the City of Detroit's intention to enjoin their operation under the State Zoning Enabling Act and the City Zoning Ordinances, to-wit: Ordinance No. 742-G. (App G, pp 65-79)

Following such notification, the Respondents filed separate actions seeking declaratory and injunctive relief in the Federal District Court, Eastern District of Michigan, Southern Division, pursuant to 42 USC 1983, claiming that their constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States were threatened by the proposed action of the various city officials, Petitioners herein. The jurisdiction of the court was invoked under 28 USC 1331 and 28 USC 1343 (3).

The District Court consolidated the cases for argument and, on March 22, 1974, issued an Opinion which upheld in part the ordinances in question. (App D, pp 43-60) Judgment was entered in the case styled *Nortown Theatre, Inc. v Gribbs, et al,* on April 25, 1974; (App E, pp 61-62), and in *American Mini Theatre, Inc., et al v Gribbs, et al,* on May 20, 1974 (App F, pp 63-64). Respondents appealed the decision to the Sixth Circuit Court of Appeals, and on June 16, 1975, the appellate court ruled that the two ordinances at issue were invalid under the Equal Protection clause of the Fourteenth Amendment. (App A, pp 15-39)

On July 18, 1975, pursuant to motion by the Petitioners, an Order Staying Mandate was issued by the Sixth Circuit Court of Appeals. (App C, p 42)

REASONS FOR DENYING THE WRIT

The decision of the Sixth Circuit Court of Appeals is clearly correct and is supported by extensive precedent and further there is no substantial federal question presented by the decision of the appellate court.

The ordinances in question differentiates between one kind of bookstore or theatre and another solely upon the content of the press materials intended to be sold or exhibited on the premises. "The operative distinction is the message on the picket sign. But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dept v Mosely*, 408 US 92. In the case at bar, the Nortown Theatre had been operated as a motion picture theatre and had continuously exhibited films for over 30 years. It was not until Respondent, Nortown Theatre, Inc., changed the motion picture films displayed on the premises to those of a sexually explicit nature that Respondent fell within the regulatory purview of the ordinances in question. "The regulation 'thus slip(s) from the neutrality of time, place and circumstance into a concern about content.' This is never permitted." *Police Dept v Mosely, supra,* at 99.

Since the ordinances by their terms and as applied, differentiate between press materials based upon content which have not been found to be obscene at a prior adversary on the issue of their obscenity, said materials are pre-

sumptively protected by the First Amendment. Where fundamental rights and liberties are asserted under the equal protection clause, the test to be applied to the statutory classification under attack is whether it is " . . . *necessary* to the achievement of a *compelling* state interest." *Eisenstandt v Baird,* 405 US 438, 447, Note #7. The Petitioners have asserted that "deleterious effects on a neighborhood are caused by . . . theatres and bookstores . . . only . . of an 'adult' nature The separate classification and treatment of 'adult' theatres and bookstores is necessary . . . because of the ill effects on the neighborhood caused by the establishment and operation of those businesses, which effects are not caused by 'non-adult' businesses." The United States Supreme Court recently struck down an ordinance which discriminated amongst movies solely on the basis of content. In *Erznoznik v City of Jacksonville,*——US——, 45 L Ed 2d 125, the court said that, "although each case ultimately must depend upon its own special facts, some general principles have emerged . . . when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." There, the municipality asserted that the ordinance was intended to protect the right of privacy of its citizens from unwilling exposure to materials that may be offensive; here the Petitioners assert their intention to protect a neighborhood from deleterious or adverse effects which are caused by the establishment and operation of so-called "adult" businesses. In *Erznoznik v City of Jacksonville, supra,* the municipality was unable to justify the ordinance on the basis of a competing claim of privacy which has always been recognized as, " . . . plainly rooted in the traditions and significant concerns of our society . . . " If the assertion of countervailing rights of privacy are insufficient to overcome the preferred position of free speech and press, it then follows that unproven and undifferentiated fears of a potential evil such as the alleged adverse effects arising from the establishment of an "adult" business are unavailing as the requisite "compelling state interest" necessary to overcome the Petitioners' heavy burden of justification. Were the court to hold otherwise, this " . . . authority would effectively employ a majority to silence dissidents simply as a matter of personal predelictions." *Cohen v California,* 403 US 15, 21. Thus, the alleged ill effects on neighborhoods ". . . cannot justify . . . censorship of otherwise protected speech on the basis of its contens." *Erznoznik v City of Jacksonville, supra,* at 132, Note #9, "We are not concerned in this case with a properly drawn zoning ordinance restricting the location of . . . theatres or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from . . . visual and audible intrusions. . . . " The analysis of the Sixth Circuit Court of Appeals that the ordinances in question are invalid under the Equal Protection Clause of the Fourteenth Amendment is correct.

The Appellate Court said, "Believing as we do that the two ordinances under consideration in this case are invalid under the equal protection clause of the *Fourteenth Amendment,* we will pass to a discussion of that issue without dwelling on the due process challenges, . . . [vagueness or overbreadth or failure to provide for speedy judicial determination of the validity of the particular restraint applied] . . ." (App A, p 25). Though the Court felt it unnecessary to consider whether the ordinances violated the *First* and *Fourteenth Amendments* on grounds other than Equal Protection, those grounds are available to support the decision of the Sixth Circuit Court of Appeals in striking down the ordinances in question.

It is no longer open to question that motion picture films are a means of expression protected by the *First Amendment. Joseph Burstyn, Inc v Wilson,* 343 US 495; *Jenkins v Georgia,* 418 US 153. And the setting of a commercial motion picture theatre exhibiting motion picture films is equally entitled to those same protections. *Roaden v Kentucky,* 413 US 496. The ordinances, by their terms, place a burden upon the establishment of a motion picture theatre in a particular place. Whether the theatre must meet the requiremnts of the ordinances in question depends upon whether "adult" films as defined in the ordinances are intended to be exhibited on the premises. Thus, the burden is imposed at a particular location because of what is intended to be exhibited at some time in the future at that location.

The ordinances sweep far beyond the permissible restraints on obscenity and thus applies to films that are protected by the *First Amendment. Miller v California,* 413 US 15; *Erznoznik v City of Jacksonville, supra.* The ordinances in question have created a system whereby a third category of press materials is subject to regulation. The press materials are not deemed to be obscene and therefore unprotected. Nor are they deemed to be fully protected by the free speech and press provisions of the *First Amendment.* The press materials which would fall within the regulatory purview of the ordinances are defined as "adult" materials and for certain specified reasons, are said to be "objectionable" and therefore subject to regulation. This is justified by petitioners on the grounds that the ordinances regulate but do not totally prohibit the objectionable press materials. However, this Court disposed of petitioners basic premise that, "The challenged city ordinances regulated the *location* of adult businesses, but do not prohibit them, nor censor the con-

tent once the business has been established," in *Southeastern Promotions, Ltd v Conrad,* 420 US 546, where the Court said " . . . It does not matter . . . that the board's decision might not have had the effect of total suppression of the musical in the community." The Court then stated at note no. 8:

> "Also important, though unessential to our conclusion, are the classificatory aspects of the Board's decision. A licensing system need not effect total suppression in order to create a prior restraint. In Interstate Circuit v Dallas, 390 US 676, 688, 20 L Ed 2d 225, 88 S Ct 1298 (1968), it was observed that the evils attendant on prior restraint 'are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression.' In that case, the Court held that a prior restraint was created by a system whereby an administrative board in Texas classified films as 'suitable for young persons' or 'not suitable for young persons.' The 'not suitable' films were not suppressed, but exhibitors were required to have special licenses and advertise their classification in order to show them. Similarly, in Bantam Books, Inc v Sullivan, 372 US 58, 9 L Ed 2d 534, 83 S Ct 631 (1963), the Court held that a system of 'informal censorship' working by exhortation and advice sufficiently inhibited expression to constitute a prior restraint and warrant injunctive relief. There, the Court held unconstitutional a system in which a commission was charged with reviewing material 'manifestly tending to the corruption of the youth'; it did not have direct regulatory or suppressing functions, but operated by

persuasion and intimidation, and these informal methods were found effective."

. . .

That speech which is presumptively protected by the *First Amendment* is fully protected, and this protective umbrella is not subject to qualification. The ordinances thus are overbroad and violative of the *First* and *Fourteenth Amendments* for they bring within their regulatory purview protected as well as unprotected speech. When such an overborad ordinance is used and applied to proscribe future speculative activity *i.e.,* what is intended to be exhibited at a theatre which itself is intended to be established, no adequate safeguards—in the form of prior adversary hearings—are afforded for press materials which might be non-obscene and thus protected by the *First Amendment.* " . . . A state is not free to adopt whichever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v Search Warrant,* 367 US 717, at p 731. Yet assuming *arguendo* petitioners could somehow justify a third category of speech, whatever the standard to be applied, the ordinances in question must, "afford appropriate procedural safeguards." . . . The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of *First Amendment* rights . . ." *Southeastern Promotions Ltd v Conrad, supra,* at p 562. In that case this Court reiterated its position with regard to any system of prior restraint, stating:

> " . . . None of the cimcumstances qualifying as an established exception to the doctrine of prior restraint was present. Petitioner was not seeking to use a facility primarily serving a competing use.

> . . . Nor was rejection of the application based on any regulation of time, place, or manner related to the nature of the facility or applications from other users.
>
> . . . No rights of individuals in surrounding areas were violated by noise or any other aspect of the production.
>
> . . . There was no captive audience.
>
> . . . Whether petitioner might have used some other privately owned, theatre in the city for the production is of no consequence . . . Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v State, *supra,* 308 US at 163, 84 L Ed 155.
>
> Thus, it does not matter for purposes of this case that the Board's decision might not have had the effect of total suppression of the musical in the community . . .
>
> . . . Labelling respondents' action a prior restraint does not end the inquiry. Prior restraints are not unconstitutional per se.
>
> . . . Any system of prior restraint, however, "comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc v Sullivan, *supra,* 372 US at 80, 9 L Ed 2d 534; . . .
>
> The presumption against prior restraints is heavier—and the degree of protection broader—than

that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

In order to be held lawful, respondents' action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, it must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech.

The settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' Freedman v Maryland, 380 US 51, 58, 13 L Ed 2d 649, 15 S Ct 734 (1965).

. . . In Freedman the Court struck down a state scheme for the licensing of motion pictures, holding 'that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.' 380 US, at 58, 13 L Ed 2d 649. We held in Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safe-

guards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

. . . Insistence on rigorous procedural safeguards under these circumstances is 'but a special instance of the larger principle that freedoms of expressions must be ringed about with adequate bulwarks.' Bantam Books, Inc v Sullivan, *supra*, 372 US at 66, 9 L Ed 2d 584. Because the line between unconditionally guaranteed speech and speech that they may be legitimately regulated is a close one, the 'separation of legitimate from illegitimate speech calls for . . . sensitive tools.' "

Virtually none of the requisite procedural safeguards can be found in the body of the ordinances in question. Whatever the reasons may have been for enactment of the ordinances there is no " . . . escape [from this] . . . obligation . . ." *Southeastern Promotions Ltd. v. Conrad, supra,* at p 562.

Applying those principles to the ordinances in question, there can be no doubt that the decision of the Sixth Circuit Court of Appeals followed a long line of precedent established by this Honorable Court since the terminal case of *Near v Minnesota,* 283 US 697 and reasserted by this Court just last term in the two cases of *Southeastern Promotions, Ltd v Conrad, supra* and *Erznoznik v City of Jacksonville, supra.*

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: September 5, 1975.

Supreme Court, U. S.
FILED
OCT 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-312

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,
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v.
AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation,
Respondents.

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NORTOWN THEATRE, INC.,
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SUPPLEMENTAL BRIEF AND REPLY BRIEF OF PETITIONERS

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v.
NORTOWN THEATRE, INC.,
Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

This Supplemental Brief is submitted to bring to the attention of this Honorable Court its recent denial of certiorari in the case of *106 Forsythe Corp. v. Bishop,* No. 73-1176, the effect of which allows the ruling of the Federal Court of Appeals, 482 F 2d 280 (5th Cir 1973), and the District Court, 362 F Supp 1389 (Ga. 1972), to stand. Those decisions upheld ordinances enacted by the City Council of Athens, Georgia, similar to those challenged in the cases at bar, which classify "adult" motion picture theatres separate and apart from other theatres, require

them to be licensed, permit revocation of a license by the mayor for violation of the state obscenity law, and regulate by zoning the location of the adult theatres.

The District Court in Georgia rejected the argument by the theatre owner that the ordinances were violative of the Fourteenth Amendment, stating that the classification was not a denial of equal protection:

> "It ill befits plaintiff to question the legislative judgment that adult movie theatres are subject to zoning regulations and to being classified differently from ordinary movie theatres since plaintiff itself has resorted to classification by restricting exhibition to adults only. The legislature and Mayor and Council are going a short step further than plaintiff by restricting the locale in which the adult theatre can operate. The statute and the ordinance pursuant thereto did not prohibit the showing of adult movies; they only regulated the place of the showing. These legislative bodies may have, and doubtless did, conclude that these types of shows are undesirable in the prohibited locations in that (1) the type of clientele which may be attracted would be inimical to the best interests of the institutions and places sought to be protected, (2) although children are said to be barred they should be freed from the constant reminder that something is taking place in their midst which they must not see, and (3) there is always the possibility that self-imposed discipline may not be effective. Such reasoning has long been sufficient to justify zoning with respect to alcoholic beverages. Whatever the reasoning was, "debatable questions as to reasonableness are not for the courts but for the Legislature . . . ' *Goldblatt, supra,* 369 U.S. at 595, 82 S. Ct at 990. (at p. 1393)

The District Court further found that the licensing ordinance was " . . . not void for overbreadth, or for failing to provide standards to guide in the revocation, or for vagueness, or as imposing 'prior restraint', or as precluding the right of judicial review, or for any other reason alleged."

That decision was upheld by the Federal Court of Appeals, and will continue to be the law in the 5th Circuit, in view of the recent denial of certiorari by this Honorable Court.

In both cases at bar, the Petitioners successfully defended the Detroit ordinances regulating "adult" businesses by zoning and licensing in the District Court. The Sixth Circuit Court of Appeals consolidated the two cases and ruled, in a 2-1 decision, that the classification of "adult" theatres was violative of the equal protection clause of the Fourteenth Amendment, and invalidated Detroit's ordinances licensing and zoning "adult" theatres, bookstores and "topless" bars. That ruling is contrary to, and in conflict with, the 5th Circuit ruling in the *106 Forsythe* case, *supra.*

Petitioners respectfully submit that inasmuch as the United States Supreme Court has denied certiorari in the F*orsythe* case, allowing the 5th Circuit ruling to stand the Supreme Court should, if justice is to be served, grant certiorari to review the cases at bar. Otherwise, the City of Detroit will be placed in the inequitable position of be-

ing unable to protect its neighborhoods by effectively regulating "adult" businesses through licensing and zoning, while Athens, Georgia and other cities in the 5th Circuit will be free to enact the same type of regulatory ordinances without interference.

WHEREFORE, Petitioners respectfully request this Honorable Court to grant its Petition for Certiorari.

Respectfully submitted,

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Dated: September 30, 1975.

REPLY BRIEF

Respondents claim, in their Brief in Opposition To Petition for Writ of Certiorari, that because the challenged ordinances which regulate "adult" businesses by zoning and licensing, classify such businesses on the basis of the content of the material disseminated, the classification is necessarily unconstitutional. The Respondents contend that all speech "which is presumptively protected by the First Amendment is fully protected, and this protective umbrella is not subject to qualification." It is Respondents' argument, apparently, that any material not declared legally obscene is protected by the First Amendment and may not be classified or regulated on the basis of its content, regardless of any extraneous factors. If Respondents' argument is carried to its logical conclusion, there could be no prohibition against speech which "threatens a clear and present danger of bringing about a substantial evil which the government has power to prohibit", *Associated Press v. United States,* 326 U.S. 1, 89 L Ed 2013, 65 S Ct 1416, *reh den.*, 326 US 802, 90 L Ed 489, 66 S Ct 6 (1945), there could be no prohibition of so-called "fighting words", those personally abusive epithets which, when addressed to the ordinary citizen, are a matter of common knowledge inherently likely to provide violent reaction, *Chapinsky v. New Hampshire,* 315 US 568, 86 L Ed 1031, 62 S Ct 766 (1942); *Finer v. New York,* 340 US 315, 95 L Ed 295, 71 S Ct 303 (1951); there could be no protection against "speech" deemed inimicable to certain segments of society, such as children, *Interstate Circuit, Inc. v. Dallas,* 390 US 676, 20 L Ed 2d 225, 88 S Ct 12 (1968); *Ginsberg v. State of New York,* 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274, *reh den.* 391 US 971, 20 L Ed 2d 887, 88 S Ct 2029 (1968); there

could be no regulation of speech intertwined with conduct, when the combination or "intertwining" of speech and conduct requires regulation in order to further a compelling state interest, and no other regulation will suffice, *Cameron v. Johnson,* 390 US 611, 20 LEd 2d 182, 88 S Ct 1335 (1968); *Cox v. New Hampshire,* 312 US 569, 85 L Ed 1049, 61 S Ct 762, 133 ALR 1396 (1941); *Cox v. Louisiana,* 379 US 559, 85 S Ct 476, 13 L Ed 2d 487 (1965).

In the *Cox v. Louisiana* case, *supra,* this Honorable Court found that a compelling state interest existed in protecting the administration of justice in the court system, and recognized a classification of a certain kind of picketing, i.e., picketing "with the intent of influencing the administration of justice", which classification dealt directly with the content of the message being conveyed by the picketers. This court upheld the prohibition against that tye of picketing only, in those locations where the disruptive message was interfering with the administration of justice. Similarly, in the case at bar, the City of Detroit has demonstrated a compelling state interest in the preservation and stabilization of its neighborhoods. This compelling state interest has been recognized both at the trial and appellate court levels. In a 2-1 decision, the Sixth Circuit Court of Appeals has ruled that, regardless of the deleterious effects caused to the surrounding neighborhoods by adult businesses, which adverse effects are not caused by non-adult businesses, the City cannot treat the two classes separately, if the regulation requires a classification based upon the *content* of the material disseminated. Petitioners respectfully submit that that was not, and is not, a correct interpretation and application of the First and Fourteenth Amendments to the United States Constitution, and is contrary to the ruling in *Cox v. Louisiana, supra.*

Respondents would have this Court hold that "adult" material may be disseminated under any circumstances, regardless of the adverse effects upon the surrounding community. The City's sole remedy, Respondents claim, is the invocation of the criminal process, and the citizens of the City of Detroit have no alternative but to sit back and allow the devastating effects of Respondents' commercial enterprises upon their homes and families, knowing full well that if, indeed, the material disseminated by these "adult" businesses are ultimately found to be legally obscene, the criminal convictions will not force the closure of the businesses nor protect the neighborhoods.

In *Cox v. Louisiana, supra,* this Honorable Court permitted a regulation of conduct intertwined with a certain classification of speech, in a certain location, when it was established that regulation of the particular kind of speech, i.e., that which affects the administration of justice, when intertwined with conduct, i.e., group demonstrations, in a particular location, i.e., at or near a courthouse, was necessary, and no more restrictive than necessary, to achieve a legitimate governmental interest. Petitioners respectfully submit that the challenged ordinances in the case at bar, similarly, regulate specific conduct, i.e., the establishment of adult businesses, which are classified according to the content of the material disseminated, i.e., material which is "distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas", which are defined as:

Specified Sexual Activities:

"1. Human Genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttocks or female breast.

Specified Anatomical Areas:

1. Less than completely and opaquely covered:
   (a) human genitals, pubic region,
   (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

The regulation is not a total prohibition, but precludes the establishment of "adult" businesses in certain *locations,* i.e., within 1,000 feet of any two other regulated uses, and within 500 feet of a residentially zoned district. Even these prohibitions may be waived under certain conditions. As noted by Judge Celebrezze, the ordinances are no more restrictive than necessary, and the alternative solutions posed by the majority are no real solutions at all.

Respondents, in their opposition brief, argue that the matter now pending before this Court has been decided by the recent decisions in *Erznoznik v. City of Jacksonville,* — US — ,45 L Ed 2d 125, decided June 23, 1975 and *Southeastern Promotions, Ltd. v. Conrad,* 420 US 546, decided March 18, 1975. In *Erznoznik,* the prohibition against the showing of nudity in drive-in theatres was held to be a violation of First Amendment Rights because there was no showing by the City of a compelling state interest, or that any adverse effects caused by the exhibition could not be avoided simply by "averting the eyes." That is not the situation in the case at bar. Both the trial and appellate courts recognized that the City has shown a compelling

state interest. The City has demonstrated the adverse effects caused by the establishment of "adult" businesses in Detroit and New York, which adverse effects cannot be avoided simply by "averting the eyes." The families, and the businesses which serve them, are the "captive audiences" of the deleterious effects caused by the location of "adult" businesses immediately adjacent to residential neighborhoods. This Court has recognized the City's responsibility to protect the interest of the "captive audience", and has upheld a refusal to accept political advertisements for display on City buses. *Lehman v. City of Shaker Heights,* 418 US 298, 304, 306-308 (1974).

In *Southeastern Promotions Ltd. v. Conrad, supra,* this Court held that the denial of the use of a municipal theatre for a production of "Hair", based solely on the board members' judgment of the musical's content, constituted an illegal prior restraint under a system lacking in constitutionally required minimal procedural safeguards. The official action in denying access to a public forum was likened to the censoring effect from the official actions, consistently identified as illegal prior restraints, in *Shuttlesworth v. Birmingham,* 394 US 147 (1969); *Staub v. City of Baxley,* 355 US 313 (1958), and others cited by the Court. All the cases had this in common: they gave public officials the power to deny use of a forum in advance of actual expression. In each of the cited cases, the prior restraint was embedded in the licensing system itself, operating without acceptable standards. In the *Southeastern Promotions* case, the Board's unbridled judgment effectively kept the musical off stage, even though there had been no determination that the musical was obscene, or that the producers were seeking to use a facility which was primarily serving a competing use, or that the production was not appropriate because of time, place, or manner of the presenta-

tion in relation to the nature of the facility or applications from other users, or that the rights of individuals in surrounding areas were violated, or that there was a captive audience.

In the case at bar, we are not considering a public forum where all are entitled to speak their piece. We are considering licensing and zoning laws in which the City Council, after careful investigation and evaluation, and a realistic appreciation of the impact of "adult" businesses from past experience in New York City and in the City of Detroit, determined that "adult" businesses should be regulated as to their location. The differing treatment afforded to "adult" businesses because of adverse effects directly attributable to them, but not to non-adult theatres, bookstores, or cabarets, was the same kind of treatment afforded other business classifications which were subjected to more restrictive zoning regulations as the detrimental aspects of the business increased. For example, a gasoline station would be permitted in most business districts, but the zoning restrictions become tighter when the gasoline stations expands to include a "tune-up" service, and even more restrictive when the automobile repair service provided expands from a typical "tune-up" to a fender repair and then to a complete overhaul or paint job. The classification in that instance is made, not because of the work performed per se, but because the adverse effects on the surrounding neighborhood becomes increasingly detrimental in direct relation to the kind of car service rendered by the gasoline station.

The standards or guidelines provided in the challenged zoning and licensing ordinances are not directed toward the dissemination of any particular piece of material. Although the Court of Appeals did not consider this issue,

the trial court did uphold the ordinances against the specific claims that they were vague, overbroad and in violation of the due process clause of the Fourteenth Amendment.

Respondents urge that this court apply the reasoning of *Southeastern Promotions, Ltd.*, to the case at bar, and find that the City's zoning and licensing regulations are an impermissible prior restraint. The term "prior restraint" requires close analysis and critical judgment in applying the thought behind the phrase. *Kingsley Books v. Brown*, 354 US 436, 1 L Ed 2d 1469, 77 S Ct 1325 (1957). In the case at bar, adult motion pictures are not prohibited. The regulations are addressed to the question "where" adult motion pictures should be exhibited; not to the question of "when," "what" or "how." The determination as to whether or not material is "adult" and subject to the zoning and licensing ordinances is subject to strictly and narrowly drawn provisions which can be easily and clearly understood by the average person. If, under the ordinances, the material is classified as "adult", it is not censored nor prohibited. An "adult" business once established, may disseminate "adult" material without any interference so long as it complies with the regulations applicable to every other theatre, bookstore or cabaret. The ordinances challenged here simply regulate the *location* of the "adult" businesses which seek to become established within the City, but do not interfere with any "adult" businesses established prior to their enactment. The regulations are not an impermissible prior restraint upon the Respondents' exercise of their First Amendment rights.

Petitioners respectfully submit that the competing interests of the "adult" commercial enterprises versus the City residents located in the same neighborhood; the "captive audience" aspect of those residents who are forced to

watch the decline of the neighborhood because of the infiltration of entrepreneurs who cater to the sexual whims of persons drawn primarily, if not entirely, from outside the neighborhood; the lack of censorship as to *what* material is disseminated; the limitation of the regulations as to *where* the material is disseminated; the recognition that the adverse effects caused by "adult" businesses are directly attributable only to the "adult" businesses, but not to similar businesses of a non-adult nature; are all factors which distinguish the case at bar from the holdings in *Erznoznik* and *Southeastern Productions, Ltd.*

Finally, as noted in the Supplemental Brief, submitted herewith, the City of Detroit will not have an effective means to protect its residential neighborhoods from the influx of adult businesses if the challenged ordinances are not upheld. At the same time, those cities within the jurisdiction of the Fifth Circuit Court of Appeals, by virtue of the recent denial of certiorari in *106 Forsythe Corp. v. Bishop*, cited in the Supplemental Brief, will be free to continue to enact regulatory provisions relating to "adult" businesses.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Honorable Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-312

ROMAN GRIBBS, Mayor of the City of Detroit, et al., Petitioners,

v.

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v.

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

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OPINIONS BELOW

The opinion of the Court of Appeals (App A, pp 15-39) is not reported. The opinion of the District Court (App. D, pp 43-60) is reported at 373 F Supp 363.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App. B, pp. 40-41) was entered on June 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a compelling state interest exists which requires regulation of businesses which offer for sale or exhibition "adult" material.

2. Whether the zoning and licensing regulations affecting "adult" businesses are based upon a reasonable classification, and bear a reasonable relation to the legitimate governmental purpose sought to be achieved.

3. Whether the provision of the new zoning and licensing laws affecting "adult" businesses are clearly defined with narrow specificity and are directed only against those businesses which, in the interest of the general welfare, must be regulated.

4. Whether the provisions of the new zoning and licensings laws affecting "adult" businesses provide procedural due process which do not operate as a prior restraint on the exercise of Respondents' rights under the First and Fourteenth Amendments to the U. S. Constitution.

STATUTES AND ORDINANCES INVOLVED

The legislative body of the City of Detroit is authorized to divide the City into zoning districts, and to regulate and restrict the location of trades therein, by virtue of the authority granted by the Zoning Enabling Act, 1921 PA 207 (MCLA 125.581) which provides:

> "The legislative body of cities and villages may regulate and restrict the location of trades and industries and the location of buildings designed for

> specified uses and for such purposes divide any city or village into districts of such number, shape and area as may be deemed best suited to carry out the provisions of this section. For each of such districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades and industries that shall be permitted or excluded or subjected to special regulations. Such *regulations shall be made* in accordance with a plan designed to lessen congestion on the public streeets, to promote public health, safety and general welfare, and shall made *with reasonable consideration,* among other things, *to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development.*" (Emphasis added.)

By virtue of that authority, the Detroit City Council enacted several amendments to its Official Zoning Ordinance, which defined certain "adult" businesses, and designnated them as "regulated uses". These amendments were incorporated into Ordinance 742-G, (App. G, pp. 65-79). Section 66.0100 of the Official Zoning Ordinance was not amended, but is inserted here for clarification in reading the amendments incorporated in 742-G. Section 66.0100 provides:

> "Application to establish any of the above regulated uses shall be made to the City Plan Commission, who shall not approve such request if there is already in existence two or more such regulated uses within 1,000 feet of the boundaries of the site of the proposed regulated use, excepting as provided for in Sec. 66.0101."

By Ordinance 743-G, the Detroit City Council amended Chapter 5, Article 2 of the Municipal Code to include within the provision affecting public entertainment generally, coin-operated motion picture devices, adult motion picture theatres, adult mini motion picture theatres, drive-in theatres and concert halls. (The pertinent licensing provisions of Ordinance 743-G are printed in the Appendix at pp. 80-84).

STATEMENT OF THE CASE

In 1969, there were located within the City of Detroit, two "adult" bookstores, two "adult" theatres, and two insignificant number of "topless" cabarets. By mid-1972 the number of "adu!t" theatres had increased to eighteen, "adult" bookstores had increased to twenty-one, and "topless" cabarets numbered approximately seventy. Reports submitted to the Detroit City Council by the Police Department indicated that many of these "adult" businesses were clustering on main streets of the City (and Highland Park, a city within the City of Detroit), which were immediately adjacent to residential neighborhoods. Acting upon complaints of such neigborhood residents, the City Council enacted Ordinance 742-G, (App G, p. 65), amending the Official Zoning Ordinance by including "adult" theatres and bookstores, and Class "D" (topless) cabarets in the category of "regulated uses." "Regulated uses" were those uses determined from experience to have a deleterious effect on a neigborhood, and included taxi dance halls, bars, motels, pawnshops, etc. (Sec. 66.0000). Such uses were restricted in their location, i.e., no more than two "regulated uses" were to be permitted within 1,000 feet of each other. This prohibition could be waived by the City Plan Commission upon a showing that the proposed location of the

"regulated use" would not be injurious to the surrounding area. (Sec. 66.0101).

In addition, Sec. 66.0103 of the Ordinance prohibited the location of an "adult" business within five hundred feet of a residential unit unless the prohibition was waived by the consent of fifty-one percent of the persons living or doing business within five hundred feet of the proposed location.[1]

Ordinance 743-G (App. H, p. 80) amended the Municipal Code to include "adult" theatres under Chapter 5, Article 2, entitled "Public Entertainment Generally" and required that they be licensed by the City.

Subsequent to the enactment of the above described ordinances on November 2, 1972, the Respondent Nortown Theatre, Inc. began exhibiting films which were "adult", as defined in Sec. 32.0007 (App. G, at pp. 65-67) in an established theatre which was within 1,000 feet of several other regulated uses and within five hundred feet of a residential area. The Respondents American Mini Theatres, Inc. and Pussy Cat Theatres, Inc., converted a corner gas station to a mini theatre and offered similar "adult" fare for exhibition. The newly renovated theatre was within 1,000 feet of two other regulated uses and within five hundred feet of a residential area. The Respondents were notified by the Petitioners of the City's intention to enjoin their

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[1] The District Court ruled that this provision was unconstitutional as it was more restrictive than necessary to achieve the City's legitimate governmental purpose. The Court stated that the ordinance, as written, protected a *single* residential unit, when the City continually asserted its purpose in enacting the ordinance was the protection of *neighborhoods*. In order to correct the "defect" noted by the District Court, the City amended Sec. 66.0103 to prohibit the location of "adult" businesses within five hundred feet of a "residentially zoned district." (See Ordinance 891-G, App I, pp 84-92.)

operation under the State Zoning Enabling Act and the City zoning ordinances.

In the spring of 1973, following such notification, the Respondents claimed their constitutional rights under the First, Fifth, and Fourteenth Amendments were threatened by the proposed action of the various City officials, and sought declaratory and injunctive relief in the Federal District Court, Eastern District of Michigan, under 42 USC 1983. The jurisdiction of the Court was invoked under 28 USC 1331 and 28 USC 1343(3).

The District Court consolidated the cases for argument and, on March 22, 1974, issued a joint opinion which recognized the City's legitimate governmental purpose, and upheld the validity of the challenged ordinances with the exception noted in Footnote 1 above. (App. D, pp. 43-60). Judgment was entered in the *Nortown* case on April 25, 1974 (App. E. at p. 64) and in the *American Mini Theatres* case on May 20, 1974 (App. F, p. 63). Respondents appealed the decision to the Sixth Circuit Court of Appeals. On June 16, 1975, the Appellate Court, in a two to one decision, ruled that the ordinances were unconstitutional as they related to "adult" material, presumably protected by the First Amendment, in a different manner than other protected material, solely on the basis of content. (App. A, pp. 15-39). Judgment was entered the same day. (App. B, p. 40).

On July 18, 1975, a Stay of Mandate was issued by the Hons. Edwards, Celebrezze and Lively, the panel which decided the case in the Court of Appeals. (App. C, p. 42).

A Petition for Certiorari was filed with the United States Supreme Court on August 28, 1975, and Certiorari was granted on October 20, 1975.

SUMMARY OF ARGUMENT

1. A COMPELLING STATE INTEREST EXISTS WHICH REQUIRES REGULATION OF BUSINESSES WHICH OFFER FOR SALE OR EXHIBITION "ADULT" MATERIAL.

The right of the City of Detroit to reasonably regulate and restrict the location of certain uses, whether business, residential or industrial, is clear. *Euclid v. Ambler Co.*, 272 US 365 (1926). When those regulations affect businesses dealing in materials presumably protected by the First Amendment, the regulations must be justified. In *United States v. O'Brien*, 391 US 367 (1968), this Court held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. The Court stated:

> "We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Applying those standards to the instant case, the power to license and zone businesses and prohibit their location in certain areas is clearly within the constitutional power of the City. The governmental interest, i.e., the preservation and stabilization of neighborhoods in the City of Detroit, is unrelated to the suppression of free expression. First Amendment Rights are indirectly affected, but only

in the sense that they cannot be freely exercised in specific locations.

The challenged ordinances were enacted in response to complaints from residents and businessmen that the influx of "adult" businesses in the City of Detroit was adversely affecting the surrounding business and residential districts, decreasing property values, driving away residents and businessmen, causing increase in crime, particularly prostitution, causing neighborhood decline and the resulting lack of neighborhood pride, and generally detracting from the "quality of life" necessary to maintain a viable neighborhood. Both the trial court and the Court of Appeals recognized that the City of Detroit had demonstrated a substantial governmental interest in protecting and maintaining the character of residential neighborhoods.

It is the City's position that a compelling state interest exists which supports its zoning and licensing regulations designed to prevent "clustering" of adult businesses, and to insure the continued viability and stability of the residential neighborhoods.

2. THE ZONING AND LICENSING REGULATIONS AFFECTING "ADULT" BUSINESSES ARE BASED UPON A REASONABLE CLASSIFICATION AND BEAR A REASONABLE RELATION TO THE LEGITIMATE GOVERNMENTAL PURPOSE SOUGHT TO BE ACHIEVED.

Although the majority opinion of the Court of Appeals recognized that the City of Detroit had demonstrated a compelling interest in preserving its neighborhoods, the majority invalidated the zoning and licensing regulations affecting "adult" businesses ruling that the classification of businesses, on the basis of the contents of the material disseminated therein, is an impermissible classification

under the First Amendment. *Police Department of Chicago v. Moseley*, 408 US 1992 (1972). The majority of the Court failed to recognize that the classification of "adult" and "non-adult" businesses was necessarily defined in terms of the material disseminated therein, in order to distinguish those businesses causing deleterious effects upon the surrounding neighborhood, from similar businesses offering "non-adult" material, which did not cause such adverse effects. The ordinances are not directed toward control of the content of the material, but rather to the place and manner in which the material may be disseminated. This type of regulation as to manner and location, has been consistently upheld by this Court. *Grayned v. City of Rockford*, 408 US 104 (1972); *Cox v. New Hampshire*, 312 US 569 (1941); *Cox v. Louisiana*, 379 US 559 (1965).

The zoning regulations were narrowly drawn to accomplish two legitimate governmental purposes:

1. To avoid clustering of adult businesses and reasonably restrict the number of regulated uses which may locate in any business district serving a neighborhood;
2. To insure the continued support and commitment to the neighborhood of those persons presently residing and doing business therein.

The District Court determined that the prohibition against the establishment of more than two "regulated uses" within 1,000 feet of each other met the requirements of the *O'Brien* test, but that the prohibition against the establishment of an "adult" business within 500 feet of a "residential unit" was more restrictive than necessary to achieve the City's legitimate governmental purpose, i.e., preservation of a neighborhood. The Court stated that the ordinance, as written, protected a *single* residential

unit, when the City continually asserted its purpose in enacting the ordinance was the protection of *neighborhoods*. The City did not appeal this ruling, but attempted to correct the "defect" noted by the Disriet Court, and amended Sec. 66.0103 of Ordinance 742-G (App G, p 65) to prohibit the location of "adult" businesses within 500 feet of a "residentially zoned district." (Ordinance 891-G, App I, pp. 84-92.)

The City contends that Ordinance 742-G (as amended by Ordinance 891-G), and Ordinance 743-G were based upon a necessary, reasonable classification, and were limited in scope to accomplish only those legitimate governmental objectives which were deemed necessary to protect the public welfare.

3. THE PROVISIONS OF THE NEW ZONING AND LICENSING REGULATIONS AFFECTING "ADULT" BUSINESSES ARE CLEARLY DEFINED WITH NARROW SPECFICITY AND ARE DIRECTED ONLY TOWARD THOSE BUSINESSES WHICH, IN THE INTERESTS OF THE GENERAL WELFARE, MUST BE REGULATED.

The City of Detroit has not imposed a total prohibition on "adult" establishments, or the materials disseminated therein. The ordinances prohibit the establishment of "adult" businesses in certain locations in the city, i.e., within 1,000 feet of two other regulated uses; or within 500 feet of a residentially zoned area. The former prohibition may be waived by the City Plan Commission upon making a showing that the establishment of the "adult" business will not adversely affect the neighborhood. The latter prohibition may be waived by obtaining the consent of 51 percent of the persons living or doing business within a 500-foot radius of the proposed location. These regulations were written with the sole purpose in mind of preserving the stability of neigborhoods, and encouraging their continued growth and development. It is the City's position that both regulations are necessary in order to achieve its legitimate governmental purpose. Even if the City avoids "clustering" of regulated uses, i.e., more than two regulated uses within 1,000 feet of each other, the City is still confronted with the possibility that two regulated uses will locate every 1,000 feet, which in effect permits two regulated uses per city block. The most effective way to insure the commitment of the residents and businessmen in the neighborhood, is to prohibit deleterious businesses adjacent to residential areas, and assure the residents and businessmen that such deleterious businesses will be permitted only if a majority of them consent. *Thomas Cusack Co* v *Chicago*, 242 US 526 (1917).

The distinction between the treatment of "adult" businesses and "non-adult" businesses is justifiable because of the difference in impact upon the surrounding neighborhood caused by the two types of businesses. There has been no showing that "non-adult" businesses dealing in motion pictures, stage performances and press materials cause the same delererious effects which are brought about by the establishment of "adult" businesses. The suggestion by the majority of the Court of Appeals that Detroit could legally accomplish its goals by requiring all bookstores and theatres to locate in enclaves within the city, or by restricting their hours of operation, would not solve the problems of decreased property values, increase in crimes, and blight and decay of the surrounding neighborhood. The Times Square District in New York City, beginning at 42nd Street several years ago, and now reaching into the high 50's, should be a sufficient lesson to city planners that the deleterious effects of "adult" businesses cannot be contained.

The city of Detroit should not be required to suffer similar outgrowths of its clusters of adult businesses, and the resulting deterioration to its surrounding neighborhoods, before taking affirmative action to stop the blight. Creating new "clusters" is not the solution.

Finally, the similar treatment of all theatres and bookstores suggested by the majority of the Court of Appeals would, undoubtedly, result in a claim of overbreadth by the "non-adult" businesses who would be subjected to restrictive regulations without any showing of compelling state interest in their regulation.

4. THE PROVISIONS OF THE NEW ZONING AND LICENSING LAWS AFFECTING "ADULT" BUSINESSES PROVIDE PROCEDURAL DUE PROCESS AND DO NOT OPERATE AS A PRIOR RESTRAINT ON THE EXERCISE OF RESPONDENTS' RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondents have contended that the zoning and licensing regulations of "adult" businesses are, in effect, a precensorship system which fail to meet the criteria enunciated in *Freedman* v *Maryland,* 380 US 51 (1965), thereby denying to them the procedural due process required by the Fourteenth Amendment. That case, and others cited by respondents, prohibit any regulation which suppresses material presumably protected by the First Amendment, prior to an adversary hearing, which must be provided within a reasonable time. That is not the situation in the case at bar. Ordinances 742-G and 743-G provide specific guidelines to determine whether a license should be issued for the operation of an adult motion picture theatre. The zoning regulations are equally specific. At no time is the material disseminated from the "adult" business subject

to censorship. If the applicant complies with the narrowly drawn licensing and zoning regulations, he is entitled to begin operation of his business, in the same manner as any other applicant who seeks to operate a business within the city of Detroit. The respondents herein readily admitted that they refused to admit minors to their theatres. In doing so, they have themselves recognized that the material offered is of an "adult" nature. The licensing regulations pertaining to the issuance of an "adult" theater license, aside from recognizing the distinction between "adult" and "non-adult" are the same. If the applicant has violated city or state laws "regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby," he may be denied a license. This is a reasonable licensing provision applied equally to all applicants seeking to operate a public entertainment within the city of Detroit. The provision was upheld against constitutional challenges in *Tally* v *City of Detroit,* 54 Mich App 328; on rehearing, 58 Mich App 261 (1975).

As the zoning and licensing regulations relate to the location and operation of the business, not to the content of the material disseminated, and do not suppress or prohibit the dissemination of any kind of material in such establishments, there is no prior restraint on First Amendment rights by reason of the enforcement of Ordinances 742-G and 743-G.

ARGUMENT

I.

A COMPELLING STATE INTEREST EXISTS WHICH REQUIRES REGULATION OF BUSINESSES WHICH OFFER FOR SALE OR EXHIBITION "ADULT" MATERIAL.

In the matter before the Court, the respondents contend that as exhibitors of motion pictures they are protected by the First and Fourteenth Amendments to the United States Constitution and, therefore, the recent amendments to the ordinances of the City of Detroit regulating disseminators of "adult" material by 1) requiring licenses for adult motion picture theatres, and 2) prohibiting the location of adult theatres, adult bookstores, and "topless" cabarets[2] within 1,000 feet of two other "regulated uses" without a waiver from the City Plan Commission, or within 500 feet of a residential unit[3] without a petition signed by 51% of neighboring residents and merchants consenting to the location of such establishment, are unconstitutional.

At the outset it should be understood that the City has not made a blanket prohibition against the operation of adult businesses within its territorial limits. The City has merely attempted to regulate the location of such busi-

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[2] The invalidation of Ordinance 742-G by the Court of Appeals affects the City's attempt to control the proliferation of Group "D" ("topless") cabarets, even though the City's authority to regulate in this area was never argued before, nor considered by the Court of Appeals or the trial court. It is Petitioners' position that the ruling, if interpreted to invalidate regulation of cabarets, is clearly contrary to this Honorable Court's decision in *California v. LaRue*, 93 S Ct 390, 409 US 109, 34 L Ed 2d 342 (1972); and to *Crownover v Musick*, 509 P 2d 497, cert den 39 L Ed 2d 489 (Cal 1974).

[3] See Footnote 1, *supra*.

nesses in a manner and by a method which is conducive to the stable, physical development of its neighborhoods. The City is attempting to continue its long-standing efforts to regulate the location of those businesses which, when clustered together or located immediately adjacent to residential areas, are not conducive to the stability of the neighborhood, but rather create an atmosphere which drives away potential residents and merchants, adversely affects the living conditions in the neighborhood, forces a decline in property values and a resulting exodus of the residents and businessmen, and contributes to the general deterioration of the business districts and the surrounding residential neighborhoods which they serve.

In order to understand the necessity of regulating adult businesses, we must consider briefly the history of "regulated uses" in the zoning law of the City of Detroit.

The Zoning Enabling Act of Michigan, Act 207 of the Public Act of 1921, provides:

> "125.581. LOCATION OF TRADES AND BUILDINGS, USE; REGULATION BY LOCAL BODIES. SECTION 1. The legislative body of cities and villages may regulate and restrict the location of trades and industries and the location of buildings designed for specified uses and for such purposes divide any city or village into districts of such number, shape and area as may be deemed best suited to carry out the provisions of this section. For each of such districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades and industries that shall be permitted or excluded or subjected to special regulations. Such regulations shall be made in ac-

cordance with a plan designed to lessen congestion on the public streets, to promote public health, safety and general welfare, and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development."

In 1962, the City of Detroit enacted Section 66.0000 of the Official Zoning Ordinance which classified certain businesses as "regulated uses". Section 66.0000 provided:

> "In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e., not more than two such uses within one thousand feet of each other which would create such adverse effects). Uses subject to these controls are as follows:
>
> Establishment for the sale of beer or intoxicating liquor for consumption on the premises.
> Hotels or motels
> Pawnshops
> Pool or billard halls

> Public lodging houses
> Secondhand stores
> Shoeshine parlors
> Taxi dance halls."

Section 66.0100 provides:

> "Application to establish any of above regulated uses shall be made to the City Plan Commission, who shall not approve any such request if there is already in existence two or more such regulated uses within one thousand feet of the boundaries of the site of the proposed regulated use, excepting as provided for in Section 66.0101."

Section 66.0101 allows for a waiver of the above prohibitions upon a showing of facts which would indicate that the business would not be injurious to surrounding properties. (App. G, p. 68).

The classification of these regulated uses were made after a determination by the Common Council that the "skid row" atmosphere which existed on Michigan Avenue, in the City of Detroit, was created in large part by the concentration of similar types of businesses which were not oriented to serve the needs of the immediate neighborhood, but primarily attracted persons from without the surrounding community who had little or no concern for the maintenance of a viable neighborhood. After much investigation it was determined that the groups of businesses which clustered on Michigan Avenue were a direct cause of the deterioration of the neighborhood. The City administration had spent millions of dollars in urban renewal to eliminate the conditions on Michigan Avenue, and replace the skid row with desirable and stable developments. Rather than face the possibility that those businesses which were displaced

by the urban renewal would congregate in other areas of the City, creating a similar situation resulting in blight and police problems, the City Council provided that no "regulated use" would be permitted to locate within 1,000 feet of any two other regulated uses. Recognizing that there might be extenuating circumstances in individual cases, the Common Council provided that the prohibition could be waived if it were demonstrated to the City Plan Commission that the location of a particular "regulated use", within 1,000 feet of two other such uses, would not adversely affect the neighborhood, nor contribute to a skid row atmosphere.

This concept of *inverse* zoning by the prohibition of more than two certain uses within 1,000 feet of each other was upheld in three separate cases in the Wayne County, Michigan, Circuit Court. *Michigan Pawnbrokers Ass'n.,* v. *Jerome P. Cavanagh, et al,* Wayne County Circuit Court No. 5458; *Miller, et al* v. *Jerome P. Cavanagh,* Wayne County Circuit Court No. 331-491, and *Rucker* v. *City of Detroit,* Wayne County Circuit Court No. 33-455. These cases were never appealed.

In enacting these ordinances much reliance was placed on the testimony of Sociologist Dr. Mel Ravitz, Professor of Sociology, Wayne State University, and former President of the Common Council, City of Detroit (App. J, pp 3-8). Briefly, Dr. Ravitz emphasized that most residential neighborhoods have a certain cohesion and stability that is sufficient to permit them to function adequately and healthfully. At the same time, Dr. Ravitz emphasized that a residential neighborhood is very fragile. It can be ruined very easily and "ruin comes usually not by dramatic physical events such as sheer age or the sudden invasion of barbarians . . . Ruin comes to a neighborhood because its residents somehow begin to have their confidence in the

area shaken . . . Good neighborhoods are maintained because the people who live in them believe that they are sound and good and will continue to be so in the months and in the years ahead." (App., J. p. 6) Dr. Ravitz also pointed out a sociological axiom that if people believe something is true, even if it is not originally, they will tend to act as if it were true, and in so doing, help produce the condition that originally was only believed: that if residents of any neighborhood believe that the concentration of the proscribed uses damage the neighborhood, they will act as if it were true, and will seek to move away and allow people with different standards to move in. They will allow their property to decline, and will not engage in the full range of activities necessary to the maintenance of a healthful residential neighborhood.

Prior to 1969, there were located in the City of Detroit only two bookstores and two theatres which would be classified under 742-G as "adult". Since that time, the *Redrup* decision by the Supreme Court and the *Bloss* decision of the Michigan Supreme Court, which ruled that the dissemination of obscene or pornographic materials could not even be challenged unless there was (1) pandering, (2) thrusting upon unwilling adults, or (3) minors involved *Redrup* v. *New York,* 386 US 767, 875 S. Ct. 1414, 18 L Ed 2d 515 (1967); *People* v. *Bloss,* 388 Mich 409 (1972), opened the gates for a burgeoning business in "adult" types of entertainment. The entrepreneurs in pornography immediately took advantage of the situation. By 1972, in Detroit alone, there were 18 adult theatres, 21 adult bookstores, and approximately 90 Class "D" cabarets. In a comparatively short time, many adult businesses located in the same vicinity, and created pockets or clusters which the Common Council determined, on the basis of information supplied to it, must be regulated to avoid a resur-

gence of the skid row alluded to above, to protect the property values of the surrounding businesses and residences, and to maintain confidence in and stability of the neighborhoods. The information provided the Common Council as to the clustering of adult businesses, and their adverse effect on surrounding business and residential districts, is contained in the report from the Obscenity Division, Detroit Police Department, (App., J. pp. 13-16) and in concise affidavits by William Walsh and Ogust Mai Stewart, Realtors and Appraisers, (App., J. pp. 16-25). See also copy of letter from Carl H. Schmidt Co., Eight Mile Road, Detroit, addressed to Mayor Roman Gribbs, advising the Mayor that "primarily because of the adult bookstore, we are leaving Detroit". (App., J. pp. 26-27).

The Common Council was also mindful of the skid row atmosphere created in the 42nd Street District of Manhattan, New York, where entepreneurs in pornography had taken over an entire section of the City, resulting in a formidable increase in street crimes, prostitution and dope peddling. See affidavit and articles by Miss Gail Sheehy, Contributing Editor of *New York* Magazine, (App. J., pp. 29-34) and article by Edward Ramzal, December 18, 1972, New York Times, (App., J pp. 35-37) wherein it is stated:

> "The large amounts of cash found on hand—one parlor safe contained $17,000.00 in small bills—called attention to the fact that legitimate businesses were being driven out of the Times Square area because the 'massage parlors' and 'store front peep shows' were paying double and triple the rent that legitimate businesses could afford. Seymour Durst, the head of the Durst organization, a large real estate enterprise that is trying to drive pornography out of the midtown area, has stated that he had been offered $1,000.00 a month for small stores that he rented to little eating places for $500.00 a month."
>
> "'Peep shows," he said "can pay a very high rent and some property owners have figured that the only thing that will carry the property is porno.'"

Confronted with this information, and numerous complaints from residents and businessmen alike, the Common Council of the City of Detroit determined that it was absolutely necessary to regulate by licensing and zoning, adult types of entertainment, whether it be theaters, bookstores, peep-shows or Class "D" cabarets.

The Court of Appeals noted, and apparently has determined that "although the application of the ordinances is confined to 'adult' forms of entertainment, they are not designed to protect minors from harmful influences." The briefs and affidavits submitted by Petitioners refute this contention as they repeatedly emphasize the necessity of protecting and preserving the residential areas of the City and the business districts which serve them. Ordinances seeking to protect and preserve residential zoning districts have always been enacted with the intent of providing a suitable atmosphere for family living, and a suitable atmosphere to raise children. This basic principle of zoning residential areas to provide for *family* needs has been consistently recognized by our courts, most recently in *Berman* v *Parker*, 348 US 26 (1945) and *Village of Belle Terre* v. *Boraas*, 416 US 1 (1974) where a zoning ordinance was recognized as:

> ". . . economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the equal protection clause if the law be 'reasonable, not

arbitrary,' (citation omitted) and bears 'a rational relationship to a (permissible) state objective.'. . .

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

Obscenity is not an issue in the case at bar. The dissemination of "obscene" or "pornographic" material may be, and is now totally prohibited in the City of Detroit. In its June, 1973 rulings on obscenity, the United States Supreme Court clearly and emphatically held that obscene material was *not* protected by the First Amendment, and could be suppressed, either by criminal or civil sanctions. See *Miller* v. *California,* 413 U.S. 15, 37 L Ed 2d 419 (1973) and *People* v. *Bloss,* 27 Mich App 687; overruled in 388 Mich 409 (1972); vacated and remanded 413 US 909; 37 L Ed 2d 1021 (1973). In December of 1974 the City adopted an ordinance prohibiting pornography, based on the *Miller* guidelines.

Even though there is now no question that pornography may be banned, there remains the very real problem of controlling the influx of adult businesses whose stock in trade, whether films, magazines or performances, are entitled to display and/or distribution before any judgment may be made as to whether the material offered is pornographic. In addition, unless and until the courts rule that the use of an establishment to exhibit or sell obscene press materials or films is abateable as a nuisance, continued and

repeated convictions for disseminating pornographic material will not close those business establishments which are the continuing, visible sources of material which is offensive to the neighboring business and residential community, whether or not the material has been legally determined to be pornographic. Experience has shown that one or more convictions against an establishment does not force its closure, nor does it offer any protection to the neighborhood.

The necessity for zoning adult businesses, which offer material which may or may not be pornographic, was discussed at length during oral argument before the Hons. Kennedy and Gubow (App. L., pp. 47-50). The discussion ended with the following remarks:

> Judge Kennedy: "What you are saying is that the criminal law won't preserve the neighborhood."
> Mrs. Reilly: "That's right, your Honor. Thank you. She said it in a nutshell . . ."

The City recognizes that even though it is zoning the use of property, and licensing the operation of a business, it is regulating the manner in which material, presumably protected by the First Amendment, may be disseminated. However, it cannot be emphasized enough that the zoning and licensing ordinances only regulate, *but do not prohibit* the dissemination of adult material in the City of Detroit.

This Honorable Court has carved certain exceptions to the general rule that "pure speech" is protected by the First Amendment. These exceptions include expressions of ideas, in whatever form, which are obscene, *Roth* v. *United States,* 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304 (1957); *Miller* v. *California, supra;* which threaten a clear and present danger of bringing about a substantial evil

which the government has power to prohibit, *Associated Press* v. *United States*, 326 US 1, 89 LEd 2013, 65 S Ct 1416, Reh Den 326 US 802, 803, 90 L Ed 489, 66 S Ct 6, 7 (1944); which involve so-called "fighting words", those personally abusive epithets which, when addressed to the ordinary citizen, are as a matter of common knowledge inherently likely to provoke violent reaction. *Chaplinsky* v. *New Hampshire*, 315 US 568, 86 L Ed 1031, 62 S Ct 766 (1942). *Feiner* v. *New York*, 340 US 315, 95 L Ed 295, 71 S Ct 303 (1951). This Court has ruled that these exceptions are not protected by the First Amendment, and may be *totally* prohibited.

Where, however, protected "speech" is combined with "non-speech" elements in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. Consonant with this ruling, the U.S. Supreme Court has upheld the authority of governmental units to regulate picketing, *Shuttlesworth* v. *Birmingham*, 394 US 147, 22 L Ed 2d 162, 89 S Ct 935 (1969), the activities of lobbyists, *United States* v. *Harris*, 347 US 612, 98 L Ed 989, 74 S Ct 808 (1953), the operation of sound trucks, *Kovacs* v. *Cooper*, 336 US 77, 93 L Ed 513, 69 S Ct 448, 10 ALR 2d 608 (1949); activities near a school, *Grayned* v. *City of Rockford*, 408 US 104, 33 L Ed 2d 222, 92 S Ct 2294 (1972); and picketing near a Courthouse which may interfere with the administration of justice, *Cox* v. *Louisiana*, 379 US 559, 85 S Ct 476, 13 L Ed 2d 487 (1965). See also: *McAlpine* v. *Reese*, 309 F Supp 136 (DC 6th Cir 1970). In each of these cases, the courts held that the government had a "substantial" or "compelling" interest which justified its regulation (not prohibition) of speech when it was intertwined with conduct.

"What the defendants overlook in this argument is what has been described as 'interwining.' *Cox* v. *Louisiana*, 379 U.S. 559, 85 S Ct 476, 13 L Ed 2d 487, quoted with approval in *Cameron* v. *Johnson*, *supra*, pointed out that 'picketing and parading (are) subject to regulation even though interwined with expression and association.' The ordinance before us does not in terms prohibit any kind of gathering or of expression save that which disturbs the quietude of a school. Those interested in this form of expression are free to congregate elsewhere, to propagandize, to meet, to speak, to persuade, and debate—but not in so doing to disturb the schools. In short, and as we have heretofore observed, the ordinance deals with a topic of great and fundamental interest to our society, namely, the schools and their undisturbed operation. *Conduct at variance with this objective may be proscribed.* As well put in *Cox*, *supra*, 379 U.S. at 564; 85 S Ct at 481 'the fact that free speech is intermingled with such conduct does not bring with it constitutional protection'." *McAlpine* v. *Reese*, 309 F Supp 136 (1970).

This Honorable Court has also recognized that certain material, ordinarily protected by the First Amendment, may be regulated by the State in order to provide safeguards for certain segments of the society which should be protected, such as children. *Interstate Circuit Inc.*, v. *Dallas*, 390 US 676, 20 L Ed 2d 255, 88 S Ct 12, 98 (1968); *Ginsberg* v. *State of New York*, 390 US 676, 20 L Ed 2d 195, 88 S Ct 1274, Reh Den 391 US 971, 20 L Ed 2d 887, 88 S Ct 2029 (1968).

The standards or criteria which must be met to justify governmental regulation of protected speech have been

defined in *United States* v. *O'Brien*, 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673 (1968):

> " We cannot accept the view that an apparently, limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." • • • This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essention to the furtherance of that interest."

There is no argument here that the City does not have the power to license and zone. It is the respondents' contention that these powers may not be directed towards their operation of a business dealing in materials presumably protected by the First Amendment. As fully explained above, these regulations are directed towards the achievement of a legitimate governmental purpose, the preservation and stabilization of neighborhoods in the city. Clearly, as required by this Supreme Court in *O'Brien, supra,* the governmental interest sought to be achieved is unrelated to the suppression of free expression; the First Amendment rights involved here are indirectly regulated, but not prohibited. Finally, the incidental restriction on the alleged First Amendment rights claimed here are no greater than are essential to further the City's purpose in regulating those businesses which tend to cause deterioration of neighborhoods. All motion picture theaters, bookstores and cabarets are not regulated—only those theaters, bookstores and cabarets which offer "adult" entertainment as is specifically and narrowly defined in the ordinance.

Arguments based on "basic constitutional rights" similar to those raised here, were recently raised in *Village of Belle Terre* v. *Boraas, supra.* In this zoning case, the first decided in many years by the United States Supreme Court, the Court upheld a village zoning ordinance restricting land use to one family dwellings and excluding lodging houses, boarding houses, fraternity houses and multiple dwelling houses, rejecting the contention that the ordinance violated a person's right of interstate travel, the right of association, the right of access to the court, and the right of privacy. The Court ruled that the ordinance, which prohibited occupancy of a dwelling by more than two unrelated persons as a "family", while permitting occupancy by any number of persons related by blood, adoption or marriage, was, a reasonable exercise of the legislative discretion in drawing a "statutory line", and bore a rational relationship to a permissible state objective. In defining the extent of the police powers in relation to zoning, the Court stated:

> "We refused to limit the concept of public welfare that may be enhanced by zoning regulations. We said:
>
> 'Miserable and disreputable housing conditions may do more than spread disease and crime and

immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost unsufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

'We do not sit to determine whether a particular housing project is or is not desirable. The concept is or is not desirable. The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.' Id., 32-33, 99 L Ed 27.

• • • • •

"A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman* v. *Parker, supra.* The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people."

These same guidelines may be applied to the case at bar.

The respondents' position that a compelling State interest does not exist here is totally unrelated to reality. A city government's interest in self-preservation outweighs the

tenuous claim made by respondents that they are entitled to conduct a business dealing in First Amendment protected material without any regulation whatsoever. The need to provide a suitable atmosphere for family living and a suitable atmosphere to raise children, to avoid blight and decay of neighborhoods, to conserve property values, and to attract rather than dispel concerned citizens willing to maintain their neighborhoods, is compelling justification for the regulations imposed by the City of Detroit.

II.

A COMPELLING STATE INTEREST HAVING BEEN SHOWN, THE ZONING AND LICENSING REGULATIONS ARE BASED UPON A REASONABLE CLASSIFICATION, AND BEAR A REASONABLE RELATION TO THE LEGITIMATE GOVERNMENTAL PURPOSE SOUGHT TO BE ACHIEVED.

In its attempt to prevent the creation of clusters of adult types of entertainment, resulting in skid rows or strips having a debilitating effect on the surrounding neighborhoods, the City has utilized two methods which it is empowered to use by virtue of State Statute and City Charter. As indicated above, the State Zoning Enabling Act authorizes cities to regulate and restrict the location of trades and industries, and the location of buildings designed for specified uses, and to subject them to special regulations which shall be made in accordance with a plan designed to promote the general welfare; giving reasonable consideration to the character of the district, its peculiar suitability for particular uses, the conservation of propery values, and the general trend and character of building and population development. In 1972, when the challenged ordinances were adopted, Title III, Chapter 1, Section 12 of the Detroit City Charter provided that the Com-

mon Council shall have the power and the duty "to promote the general peace, health, safety, welfare and good government of the City; and "to provide for the regulation of trades, occupations, and amusements, and to provide for the prohibition of such trades, occupations and amusements as are detrimental to the health, morals or welfare of its inhabitants." Where the power to legislate upon a given subject is conferred, but the mode and its exercise is not prescribed, the ordinance passed in pursuance thereof must be a reasonable exercise of the power. *People* v. *Armstrong,* 73 Mich. 288 (1889). It is only when a municipal ordinance is clearly and manifestly unreasonable or oppressive in its operation, that it will be declared void. *Building Commission of Detroit* v. *Kunin,* 181 Mich 604 (1914). Various city ordinances licensing legitimate businesses and subjecting them to further controls have been repeatedly upheld by the Michigan Supreme Court. *City of Grand Rapids* v. *Braudy,* 105 Mich. 607 (1895); *People* v. *Pennock,* 294 Mich '78 (1940). *Brazee* v. *Michigan,* 241 US 340; 16 L Ed 1034, 36 S Ct 561 (1916); *Mutchell* v. *City of Kalamazoo,* 323 Mich 215 (1948); *Hughes* v. *City of Detroit,* 217 Mich. 567 (1922); *Eastwood Park Amusement Co.* v. *Mayor of East Detroit,* 325 Mich 616 (1925); *People* v. *Harley,* 230 Mich. 676 (1925); *Melconian* v. *City of Grand Rapids,* 218 Mich 397 (1922). *Prawdzik* v. *City of Grand Rapids,* 313 Mich. 376 (1946).

The classification of certain businesses as "regulated uses" which may not locate within 1,000 feet of two other "regulated uses," in order to avoid the clustering or congestion of these types of businesses, and the resulting blighting effect on the surrounding neighborhood, was upheld in three Wayne County Circuit Court cases, as indicated above. Similar locational restrictions have been upheld in *O'Connor, et al v. Board of Zoning Appeals of*

Town of Stratford, 140 Conn 65, 98 A 2d 515 (1953); *Kamerman* v. *Leroy,* 133 Conn 232, 50 A 2d 175 (1946), and *Glackman* v. *City of Miami Beach,* 51 S 2d 294 (Fla 1951).

Having demonstrated that a compelling State interest exists necessitating the regulation of the location of adult types of entertainment, the choice of methods to achieve that end, which is selected by the Common Council, if reasonable, should not be rejected by this Court. After extensive investigation and study, the Mayor's Task Force on Licensing and Zoning Procedures recommended to the Common Council of the City of Detroit that adult types of entertainment be designated as "regulated uses" so that they might be restricted in their location in various parts of the City. In addition, it was recommended by the Mayor's Task Force, that inasmuch as adult types of entertainment are businesses which have been demonstrated to have a direct impact on the conditions in the neighborhood, that the consent of the neighboring citizens should be obtained before one of these businesses would be permitted to locate within 500 feet of a residential area.[4]

A regulation which prohibits the location of a certain business within a certain distance from a residential area, but permitting the prohibition to be waived upon the showing of the consent of a certain percentage of the neighboring community, has been upheld by the United States Supreme Court and the Michigan Supreme Court. In *Cady* v. *City of Detroit,* 289 Mich 499 (1939), the issue was met head on. There the Court stated:

> "'It may be said in a general way that the police power extends to all the great public needs.' • • • It

[4] See footnote 1, *supra.*

may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' *Noble State Bank* v. *Haskell*, 219 U.S. 104 (31 Sup. Ct. 186, 32 L.R.A. (N.S.) 1062, Ann. Cas. 1912A, 487).

"Ordinances having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, the safeguarding of the economic structure upon which the public good depends, the stabilization of the use and value of property, the attraction of a desirable citizenship and fostering its permanency are within the proper ambit of the police power. Changes in such regulations must be sought through the ballot or the legislative branch."

"Regarding the complaint that the requirement of consent of 65 per cent of property owners within 600 feet of such camp must be secured before a license can be granted is unreasonable, we are constrained to hold that such conditions are valid and do not result in the delegation of a legislative power by the city to such adjacent property owners. In *Thomas Cusack Co.* v. *City of Chicago*, 242 U.S. 526 (37 Sup. Ct. 190, L.R.A. 1918A, 136 Ann. Cas. 1917C, 594), where an ordinance prohibited the erection of billboards in ertain blocks, but permitted the prohibition to be modified with consent of adjacent property owners, it was held that such an ordinance was not a delegation of legislative power but a familiar provision affecting the enforcement of laws and ordinances. 'A distinction is made between

ordinances or regulations which leave the enactment of the law to individuals and ordinances or regulations prohibitory in character but which permit the prohibition to be modified with the consent of the persons who are to be most affected by such modification.' 43 C.J. p. 246.

"If such consent is used for no greater purpose than to waive a restriction which the legislative authority itself has created and in which creation it has made provision for waiver, such consent is generally regarded as being within constitutional limitations. *City of East Lansing* v. *Smith*, 277 Mich 495."

Reasonable zoning and licensing of adult businesses which regulate, but do not prohibit the operation of a business dealing in materials presumptively protected by the First Amendment is far different from the total prohibitions which were rejected by the United States Supreme Court in *Near* v. *Minnesota*, 283 U.S. 697 (1931); and *Schneider* v. *Irvington*, 308 U.S. 146, 84 L Ed 2d 155 (1939).

The classification of "adult" theatres, bookstores, and cabarets on the basis of the content of the material disseminated therein, is a reasonable classification for purposes of licensing and zoning because a) the owners and operators readily admit that they refuse to admit minors, and b) the deleterious effects on the surrounding neighborhood are caused, not by all theatres and bookstores, but by only those businesses catering to the sexual appetites of their customers.

A similar classification was allowed to stand by this Court when it recently denied certiorari in the case of *106 Forsythe Corp.* v. *Bishop*, No. 73-1176, the effect of which allows the ruling of the Federal Court of Appeals, 482 F

2d 280 (5th Cir 1973), and the District Court, 362 F Supp 1389 (Ga. 1972), to stand. Those decisions upheld ordinances enacted by the City Council of Athens, Georgia, similar to those challenged in the cases at bar, which classify "adult" motion picture theatres separate and apart from other theatres, require them to be licensed, permit revocation of a license by the mayor for violation of the state obscenity law, and regulate by zoning location of the adult theatres.

The District Court in Georgia rejected the argument by the theatre owner that the ordinances were violative of the Fourteenth Amendment, stating that the classification was not a denial of equal protection:

> "It ill befits plaintiff to question the legislative judgment that adult movie theatres are subject to zoning regulations and to being classified differently from ordinary movie theatres since plaintiff itself has resorted to classification by restricting exhibition to adults only. The legislature and Mayor and Council are going a short step further than plaintiff by restricting the locale in which the adult theatre can operate. The statute and the ordinance pursuant thereto did not prohibit the showing of adult movies; they only regulated the place of the showing. These legislative bodies may have, and doubtless did, conclude that these types of shows are undesirable in the prohibited locations in that (1) the type of clientele which may be attracted would be inimical to the best interests of the institutions and places sought to be protected, (2) although children are said to be barred they should be freed from the constant reminder that something is taking place in their midst which they must not

> see, and (3) there is always the possibility that self-imposed discipline may not be effective. Such reasoning has long been sufficient to justify zoning with respect to alcoholic beverages. Whatever the reasoning was, "debatable questions as to reasonableness are not for the courts but for the Legislature . . . " *Goldblatt, supra,* 369 U.S., at 595, 82 S Ct at 990. (at p. 1393).

The District Court further found that the licensing ordinance was ". . . not void for overbreadth, or for failing to provide standards to guide in the revocation, or for vagueness, or as imposing 'prior restraint', or as precluding the right to judicial review, or for any other reason alleged."

That decision was upheld by the Federal Court of Appeals, and will continue to be the law in the 5th Circuit, in view of the recent denial of certiorari by this Honorable Court.

It should be emphasized here that the operation of a business which deals in the dissemination of "adult" material is a far cry from the fleeting or briefly exposed expressions protected by the First Amendment in cases such as *Cohen* v. *California,* 403 U.S. 15, 29 L Ed 2d 284, 91 S Ct 1780, where the court held that the words "fuck the draft" inscribed on a person's jacket were not such an intrusion on others' privacy as to warrant governmental regulation.

The establishment of an "adult" business, either in a cluster of businesses known to have an adverse effect on the surrounding properties, or immediately adjacent to a residential area, is a far greater intrusion on the rights of the captive families and businessmen who serve them

than was found in *Lehman* v. *Shaker Heights,* 41 L Ed 2d 770 (1974) where this Court upheld a classification of advertising on City busses on the basis of content, ruling that the City properly refused political advertising which it deemed inimicable to the "captive" passengers on the bus.

> "No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the City in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation." 41 L Ed 2d at 778.

In the case at bar, we are concerned with the operation of a business which comes, and stays, and contributes directly either to the well being and stability of a neigborhood, or to its deterioration, blight and decay. Adjoining property owners have no choice in the matter. Without governmental regulation, there is no means by which adjoining property owners may control or even influence the use to which property is put another landowner. Reasonable control over the use to which property may be put has been traditionally lodged in the governmental units and must be retained if there is to be any sensible pattern of development in our cities. It is only through the government that a well-planned community may develop. The amended provisions of [redacted] 66.000, which prohibit the location of more than [redacted] types of "adult" entertainment within 1,000 feet of each other, or of other regulated uses, and which prohibits their location within 500 feet of a residentially zoned district, unless such prohibition is waived by the consent of 51% of the persons living or doing business within a 500 foot radius of the proposed location, is the only reasonable means of restricting the number of regulated uses which may locate in a certain neighborhood, and of insuring the continued support and commitment to the neighborhood of those persons presently residing and doing business therein.[5]

In the *Cox* v. *Louisiana* case, *supra,* this Honorable Court found that a compelling state interest existed in protecting the administration of justice in the court system, and recognized a classification of a certain kind of picketing, i.e., picketing "with the intent of influencing the administration of justice", which classification dealt directly with the content of the message being conveyed by the picketers. This court upheld the prohibition against the type of picketing only, in those locations where the disruptive message was interfering with the administration of justice. Similarly, in the case at bar, the City of Detroit has demonstrated a compelling state interest in the preservation and stabilization of its neighborhoods. This compelling state interest has been recognized both at the trial and appellate court levels. In a 2-1 decision, the Sixth Circuit Court of Appeals has ruled that, regardless of the deleterious effects caused to the surrounding neighborhoods by adult businesses, which adverse effects are not caused by non-adult businesses, the City cannot treat the two classes separately, if the regulation requires a classification based upon the *content* of the material disseminated. Petitioners respectfully submit that that was not, and is not, a correct interpretation and application of the First and Fourteenth

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[5] An extensive list of those public amusements which are prohibited within 500 feet of a residence, unless such prohibition is waived by the consent of 51% of the surrounding neighborhood, may be found in Sec. 5-2-1.1 of the Detroit Municipal Code.

Amendments to the United States Constitution, and is contrary to the ruling in *Cox* v. *Louisiana, supra.*

In that case, this Honorable Court permitted a regulation of conduct interwined with a certain classification of speech, in a certain location, when it was established that regulation of the particular kind of speech, i.e., "that which affects the administration of justice", when interwined with conduct, i.e., group demonstrations, in a particular location, i.e., at or near a courthouse, was necessary, and no more restrictive than necessary, to achieve a legitimate governmental interest. Petitioners respectfully submit that the challenged ordinances in the case at bar, similarly, regulate specific conduct, i.e., the establishment of adult businesses, which are classified according to the content of the material disseminated, i.e., material which is "distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas".

The regulation is not a total prohibition, but precludes the establishment of "adult" businesses in certain *locations*, i.e., within 1,000 feet of any two other regulated uses, and within 500 feet of a residentially zoned district. Even these prohibitions may be waived under certain conditions. As noted by Judge Celebrezze, the ordinances are no more restrictive than necessary, and the alternative solutions posed by the majority are no real solutions at all.

The power granted to the City relating to the licensing of these adult entertainments (adult bookstores are not licensed) are extremely limited. The applicable provisions of Sec. 5-2-2 of the Detroit Municipal Code which provides that prior to the issuance of a license certain City Code requirements (Electrical, Building, Plumbing, etc.) must be complied with are reasonable regulations which are required of all businesses open to the public in the City of Detroit.

"The fact that plaintiffs seek to exercise First Amendment rights does not prohibit the municipality from imposing regulations under its police power. The regulations must, however, have a substantial relationship to the public health, safety, morals, or welfare. The commercial enterpreneur can legitimately be subjected to license regulations which, for example, require a reasonable and nonconfiscatory license fee to provide additional revenue to offset increased municipal expenses resulting from the licensee's operation. Likewise, regulations which require that the licensee's business premises comply with health, safety, and fire laws, and which provide means for inspection to assure compliance, would unquestionably be deemed reasonable." *Soof* v. *City of Highland Park,* 30 Mich App 400 (1971).

The guidelines of Ord. 743-G (Sec. 5-2-3) providing standards for issuing or denying a license were upheld against constitutional challenges in *Tally* v. *City of Detroit,* 54 Mich App 328, Rehearing 58 Mich App 261 (1975).

The constitutional guarantee of free speech and press does not require absolute freedom to exhibit every motion picture of every kind at all times and places. Nor are motion pictures necessarily subject to the precise rules governing any other particular method of expression. In *Burstyn* v. *Wilson,* 343 U.S. 495, 96 L Ed 1098, 72 S Ct 777 (1951), the U.S. Supreme Court recognized that motion pictures posed problems different than those posed by other modes of expression, and stated that if there be capacity for evil, it may be relevant in determining permissible scope of community control. See, also, *Times Film Corp.* v. *Chicago,* 365 US 43, 5 L Ed 2d 403, 81 Sup Ct 391

Reh. Den. 365 U.S. 856, 5 L Ed 2d 820, 81 Sup. Ct. 798 (1961).

Contrary to the contention of the respondents, the zoning and licensing provisions described above are clearly the utilization of the best methods available to achieve a legitimate governmental purpose, the conservation of property values, the preservation of stability in the neighborhood, and the fostering of pride in the community.

The benefits to be derived from zoning regulations, such as are under consideration here, are well expressed in *Cady* v. *City of Detroit, supra,* at page 512:

> "'It cannot be denied that a city systematically developed offers greater attractiveness to the home seeker than a city that is developed in a haphazard way. The one compares to the other about as a well-ordered department store compares to a junk shop. If such regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare. • • •
>
> 'The benefits to be derived by cities adopting such regulations may be summarized as follows: They attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquillity, and good order of the city. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of police power. He who owns property in such a district is not deprived of its use by such regulation. He may use it for the purposes to which

> the section in which it is located is dedicated. That he shall not be permitted to use it to the desecration of the community constitutes no unreasonable or permanent hardship and results in no unjust burden.' • • •'"
>
> • • • • •
>
> "'As in other applications of the police power, the difficulty concerning regulations relating to real property is in attempting to draw the line between constitutional regulation and unconstitutional invasion. The tendency is to uphold such legislation as valid regulation, for, under the modern view, the police power extends to attracting a desirable citizenship to a particular locality of a municipality and assuring its permanency, to fostering pride in, and attachment to, the city, to promoting happiness and contentment, to stabilizing the use and value of property, and to promoting the public tranquillity and good order of the city. Present-day conceptions of the extent of the public interest, particularly in relation to the public welfare, are very broad; hence, many restrictions on the uses to which real property may be put, many limitations on the type of structures which may be erected on premises in certain localities, in many groupings in definite localities of the enterprises which may be carried on on real property are now sustained as valid exercises of the police power which a few years ago in most jurisdictions were regarded as invalidly invading the constitutional rights of the property owner.'"

In conclusion we recommend to the Court's consideration the words of the Hon. Anthony Celebrezze, 6th Circuit Court of Appeals, in his dissenting opinion in this case.

"The majority suggests that the City could devise a less restrictive and even-handed method of furthering its objective. It suggests no less restrictive alternative, however, and I can see none. If Detroit is to prevent its neighborhoods from turning into sex-oriented skid rows, catering to the tastes of only one stratum of society and driving out stable residential populations, it must be allowed to limit the number of adult establishments in any area of the City. That is what the 1000-foot provision seeks to do.

"Nor does the majority suggest a feasible, more evenhanded approach. It suggests that Detroit could legally accomplish its goals by requiring *all* bookstores and theaters to locate in enclaves within the City or by restricting their hours of operation. Neither solution would serve the purpose of preventing concentrations of "adult" businesses. Indeed, the first suggested solution would accomplish precisely what Detroit seeks to prevent. Both solutions, furthermore, would impose restrictions on non-adult bookstores and theaters that have no relation to any demonstrated legitimate public purpose. Thus, they would run afoul of the first two parts of the *O'Brien* test. The majority's call for "even-handed" legislation would suggest that it considers adult and non-adult bookstores and theaters to pose similar threats to the stability of neighborhoods. The record in this case belies this conclusion and establishes the legitimate reasons for treating adult establishments in the same manner as pool rooms and bars, without treating non-adult theaters and bookstores similarly.

"I too am vigilant to protect our First Amendment freedoms. They must not be eroded out of misguided good intention. The Frst Amendment, however, was not intended to be the death-knell of cities. Detroit has carefully attempted to prevent its neighborhoods from becoming sex-oriented, crime-ridden wastelands, without unduly infringing the public's right to buy and the publisher's right to distribute non-obscene materials. The First Amendment does not condemn this effort.

"It seems to me that if we are to prevent our cities from becoming unthinkable jungles, we must, within constitutional safeguards, restore to our cities the right of self-government."

III.

THE PROVISIONS OF THE NEW ZONING AND LICENSING LAWS ARE NOT VAGUE OR OVERBROAD, BUT ARE CLEARLY DEFINED WITH NARROW SPECIFICITY AND ARE DIRECTED ONLY AGAINST THOSE BUSINESSES WHICH, IN THE INTEREST OF THE GENERAL WELFARE, MUST BE REGULATED.

The respondents have asserted that the provisions of the new zoning and licensing regulations are vague, overbroad and an unconstitutional classification. The sweeping statements made by respondents in their complaints do not direct our attention to any particular phrases or words in the new laws, yet then emphatically claim (1) that the ordinances are so vague as to convey no definite meaning; and (2) the ordinances are so broad that they infringe on First Amendment rights which, according to respondents, cannot even be regulated. Respondents' apparent position is that unless written or filmed material is legally obscene

or pornographic, the state may not, in any way, regulate the manner or location in which the "protected" material is produced or disseminated. This claim is clearly contrary to the many United States Supreme Court decisions, discussed below, which emphasize that the state may reasonably regulate expression protected by the First Amendment, even though the state would not be permitted to totally prohibit protected expression.

As "adult bookstores," "adult motion picture theatres," and "Class D cabarets" are subject to the new zoning provisions, and adult theatres and Class "D" cabarets are subject to the new licensing provisions, we set forth here, for the convenience of the court, the definitions of those phrases as they appear in Section 5-2-1.2 of the Detroit Municipal Code, (Ordinance 743-G) and Section 32.0007 of the Official Zoning Ordinance of the City of Detroit (Ordinance 742-G):

"Adult Book Store

An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter, depicting, describing, or relating to "specified sexual activities' or 'specified anatomical areas,' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

Adult Motion Picture Theatre

An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or specified anatomical areas,' (as defined below), for obesrvation by patrons therein."

"Adult Mini Motion Picture Theatre

An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas,' (as defined below), for observation by patrons therein.

For the purpose of this Section, 'Specified Sexual Activities' is defined as:

1. Human genitals in a state of sexual stimulation or arousal.
2. Acts of human masturbation, sexual intercourse or sodomy;
3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

And 'specified anatomical areas' is defined as:

1. Less than completely and opaquely covered; (a) human genitals public region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

Again, we emphasize that adult book stores are not licensed, but are merely subject to the zoning regulations.

The constitutional requirement of definiteness is violated by a statute or ordinance that fails to give a person of ordinary intelligence fair notice that his contemplated con-

duct is forbidden or regulated by the statute or ordinance. The underlying principle is that no man shall be held responsible for conduct which he could not reasonably understand to be proscribed. The U.S. Supreme Court in *United States* v. *Harriss, supra,* after enunciating the above general rule, stated:

> " . . . on the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States* v. *Petrillo,* 332 US 1, 7, 91 L Ed 1877, 1882, 67 S Ct 1538. Cf. *Jordan* v. *DeGeorge,* 341 US 223, 231, 95 L Ed 886, 893, 71 S Ct 703. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction. This was the course adopted in *Screws* v. *United States,* 325 US 91, 89 L Ed 1495, 65 S Ct 1031, upholding the definiteness of the Civil Rights Act."

Although the U.S. Supreme Court has ruled that laws regulating speech protected by the First Amendment must be drawn with "narrow specificity", it does not require exactitude. Rejecting such an argument, the United States Supreme Court in *Cameron* v. *Johnson,* 390 U.S. 611, 20 L Ed 2d, 182, 88 S Ct 1335 (1968), stated:

> "Appellants advance a two-pronged argument. First, they argue that the statute forbids picketing in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . " *Connally* v. *eGneral Construction Co.,* 269 US 385, 391, 70 L Ed 322, 328, 46 S Ct 126. But the statute probits only 'picketing . . .

> in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses . . . ' The terms 'obstruct' and 'unreasonably interfere' plainly require no 'guess(ing) at (their) meaning.' Appellants focus on the word 'unreasonably.' It is a widely used and well understood word and clearly so when juxtaposed with 'obstruct' and 'interfere.' We conclude that the statute clearly and precisely delineates its reach in words of common understanding. It is a 'precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be . . . proscribed.' *Edwards* v. *South Carolina,* 372 US 229, 236, 9 L Ed 2d 697, 702, 83 S Ct 680."

So, also, in *Cox* v. *Louisiana, supra,* the United States Supreme Court held that the failure of the legislature to define "near", when prohibiting picketing near a courthouse, did not render it unconstitutionally vague:

> "It is clear that there is some lack of specificity in a word such as 'near'. While this lack of specificity may not render the statute unconstitutionally vague, at least as applied to a demonstration within the sight and hearing of those in the courthouse, it is clear that the statute with respect to the determination of how near the courthouse a particular demonstration can be, foresees a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it. It is apparent that demonstrators, such as those involved here, would justifiably tend to rely on this administrative interpretation of how 'near' the courthouse a particular demonstration might

take place. Louisiana's statutory policy of preserving order around the courthouse would counsel encouragement of just such reliance. This administrative discretion to construe the term 'near' concerns a limited control of the streets and other areas in the immediate vicinity of the courthouse and is the type of narrow discretion which this Court has recognized as the proper role of responsible officials in making determinations concerning the time, place, duration, and manner of demonstrations. See *Cox* v. *New Hampshire* 312 US 569, 85 L Ed 1049, 61 S Ct 762, 133 ALR 1396; *Poulos* v. *New Hampshire,* 345 US 395, 97 L Ed 1105 (73 S Ct 760, 30 ALR2d 987. See generally the discussion on this point in No. 24, 379 US 553-558, 13 L Ed pp. 483-496. It is not the type of unbridled discretion which would allow an official to pick and choose . . . " (13 L Ed 2d 494).

See also *Lanzetta* v. *New Jersey,* 306 US 451, 83 L Ed 888, 59 S Ct 618; Note, *The Void for Vagueness Doctrine in the Supreme Court* 109 U Pa L Rev. 67.

Just as the words "unreasonably" "interfere" or "near" are relative terms, so the words "distinguished or characterized by" and "substantial" are relative. They are not, however, vague. "Substantial" means "material," "considerable", "more than slight or petty." See 40 *Words and Phrases,* "Substantial" pages 757-764. The word "substantial" has been used repeatedly by the U.S. Supreme Court, and particularly in its description of the sufficiency of interest which must be demonstrated by the government before the government may regulate expression protected by the First Amendment.

The words "distinguished" or "distinguishing" are frequently used in statutes relating to ballots. See *Words and*

Phrases "Distinguished Ballot," "Distinguishing Mark." As noted by the Hons. Kennedy and Gubow in their opinion at the trial level, the terms "characteristic" and "characteristic of" appear in various workmen's compensation statutes in which an injury must be characteristic of a business of the employer in order to be compensable as an occupational disease. *Carter* v. *International Detrola Corp.* 328 Mich 367 (1950).

Respondents again generalize, claiming that the new ordinances are "overbroad." Again, we refer the court to its opinion rendered in *Cameron* v. *Johnson, supra,* at page 188:

> "The second prong of appellants' argument is that the statute, even assuming that it is 'lacking neither clarity nor precision, is void for "overbreadth," that is, that it offends the constutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Zwickler* v. *Koota, supra,* at 250, 19 L Ed 2d at 451. The argument centers on the fact that the proscription of the statute embraces picketing employed as a vehicle for constitutionally protected protest. But 'picketing and parading (are) subject to regulation even though interwined with expression and association,' *Cox* v. *Louisiana,* 379 US 559, 563, 13 L Ed 2d 487, 491, 85 S Ct 476, and this statute does not prohibit picketing so interwined unless engaged in a manner which obstructs or unreasonably interferes with ingress or egress to or from the courthouse. Prohibition of conduct which has this effect does not abridge constitutional

liberty 'since such activity bears no necessary relationship to the freedom to . . . distribute information or opinion." *Schneider* v. *State*, 308 US 147, 161, 84 L Ed 155, 164, 60 S Ct 146. The statute is therefore 'a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and . . . the fact that free speech is intermingled with such conduct does not bring with it constitutional protection.' *Cox* v. *Louisiana, supra,* at 564, 13 L Ed 2d at 492."

It is petitioners' position that even though Ordinances 742-G and 743-G indirectly affect First Amendment rights, as the ordinances regulate the location and manner in which the protected material is disseminated, the ordinances are not overbroad as they are directed to, and regulate only, commercialization of adult sexual material in a manner necessary to protect residential neighborhoods. Nor are the ordinances violative of the equal protection clause, as they provide for classifications of adult "businesses" because only the "adult" businesses have been shown to attract the criminal element, such as prostitutes, etc., and drive away concerned residents and businessmen.

The decision of the Court of Appeals invalidating Ordinances 742-G and 743-G as a denial of equal protection, was based primarily upon *Police Department of Chicago* v. *Moseley*, 408 US 92 (1972). That case invalidated an ordinance which prohibited all picketing within 1000 feet of any school building during classes except "the peaceful picketing of any school involved in a labor dispute." The U. S. Supreme Court could find *no rational basis* for the distinction between "all other peaceful picketing" and "peaceful picketing involving a labor dispute." There was no showing that the ill effects on the schools caused by

"all other peaceful picketing" were different from the ill effects of "peaceful picketing involved in a labor dispute." The case is distinguishable from the case at bar because Petitioners have made a showing that the deleterious effects on a neighborhood are caused, not by all theatres and bookstores, but only those of an "adult" nature. The separate classification and treatment of "adult" theatres and bookstores is necessary not because the contents of the material disseminated in "adult" bookstores and theatres is different, but because of the ill effects on the neighborhood caused by the establishment and operation of those businesses, which effects are not caused by "non-adult" businesses.

As stated by the Honorable Celebrezze in his dissent (page 21):

> "The ordinance goes out of its way not to bar these businesses from a convenient market. Its purpose is, rather, to prevent the breakdown of neighborhoods caused by undue concentrations of these businesses. If non-adult bookstores and theatres contributed to neighborhood blight in the same way that adult businesses do, the City would, no doubt, include them as designated uses under ordinance, just as shoe shine parlors and bars are included. It is not a control on the basis of content in which the City of Detroit is engaging. It is, instead, a justifiable distinction in neighborhood impact that underlies the differential treatment between adult and non-adult businesses. This amply distinguishes our case from *Moseley*, where the City was unable to justify a differential treatment of peaceful labor picketing and peaceful non-labor picketing. The only conceivable reason for the difference in *Moseley* was that the City sought 'to restrict expression

> because of its message, its ideas, its subject matter, or its content'. *Moseley*, 408 US at 95. That is not the purpose of Detroit's ordinance."

The United States Supreme Court has recognized that a classification may be based on the content of the material regulated, if the ill effects caused by the expression of particular ideas in a particular manner, in a particular place, warrant remedial legislation and the regulation is not total prohibition. *Grayned* v. *City of Rockford, supra; Cox* v. *Louisiana, supra; Cox* v. *New Hampshire,* 312 US 569 (1941). The challenged city ordinances regulate the *location* of adult businesses, but do not prohibit them, nor censor the content once the business has been established.

The limited effect of the ordinances on "adult" businesses only was intentional to avoid a claim of overbreadth which would surely be made if the regulations were enacted with respect to all theatres and bookstores. The regulations were purposely limited to "adult" theatres and bookstores because they are the cause of the adverse effects on neighborhoods, which adverse effects provide the compelling state interest required in order to support a regulation of the dissemination of First Amendment material. *Grayned* v. *City of Rockford, supra; Cox* v. *New Hampshire, supra.*

The "solutions" posed by the Court of Appeals are not solutions, as they would be overbroad, and would require families to resort to clusters of adult businesses if they wish to attend a movie at all. As the Honorable Celebrezze stated, "indeed, the . . . suggested solution would accomplish precisely what Detroit seeks to prevent." It is respectfully submitted that the ordinances were narrowly

drawn in the most limited manner possible to accomplish the legitimate governmental purpose sought to be achieved.

In *Cox* v. *Louisiana, supra,* the United States Supreme Court upheld the authority of the city of regulate certain conduct—picketing—but only picketing "with the intent of influencing the administration of justice." Not all picketing was regulated, only that picketing in which the city could demonstrate a compelling state interest. So, in the case at bar, the regulations imposed by the new ordinances are narrowly limited to that class in which the city has shown a compelling state interest.

It is recognized, however, that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved. *Shelton* v. *Tucker,* 364 US 479, 488, 5 L Ed 2d 231, 237, 81 S Ct 247 (1960). The equal protection clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. *Williams* v. *Rhodes,* 393 US 23, 21 L Ed 2d 24, 89 S Ct 5 (1968).

The trial court ruled that the portion of Section 66.0103 (Ordinance 742-G; App G, p. A-69), which prohibited the establishment of an adult business within 500 feet of a *single* residential unit was too restrictive to achieve the city's legitimate governmental interest in protecting residential neighborhoods. (A-56, 57) Subsequent to the lower court's ruling, the City of Detroit, effective May 2, 1974, amended Section 66.0103 to prohibit the establishment of adult businesses in certain business and light industrial zoned areas in the city within 500 feet of a residentially zoned district, unless such prohibition is waived by obtaining the consent of 51% of the persons owning, residing or doing business within 500 feet of the proposed

location. The prohibition does not apply to medium or heavy industrial zoned areas. (See Ordinance 891-G, App I, p. A-89).

It is respectfully submitted then, that the definitions in the challenged ordinances are neither value, nor overbroad, nor an improper classification, as they are specific, give fair notice as to what conduct is being regulated, and are limited to those activities which must be regulated in order to preserve and stabilize residential nieghborhoods. It is further submitted that the regulations themselves, as amended effective May 2, 1974, are no more restrictive than are necessary to achieve the city's legitimate governmental purpose.

IV.

ORDINANCES NOS. 742-G AND 743-G OF THE CITY OF DETROIT PROVIDE PROCEDURAL DUE PROCESS WHICH DO NOT OPERATE AS A PRIOR RESTRAINT ON THE EXERCISE OF PLAINTIFF'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

It is asserted by the respondents that the regulations imposed by Ordinances 742-G and 743-G, which prohibit the location of adult types of entertainment within 500 feet of a residential unit (as of May 24, 1974 amended to read "within 500 feet of a residentially zoned district" [See Ordinance 891-G, App I, p. 84]), unless waived by the consent of 51% of those within a 500 foot radius, and which prohibit the location of any "regulated use" within 1,000 feet of any two other regulated uses unless such prohibition is waived by the City Plan Commission act as a "prior restraint" upon respondents' exercise of First Amendment rights. Respondents further contend that these regulations are a pre-censorship system which fail to meet

the criteria enunciated in *Freedman* v. *Maryland,* 380 US 51, 13 L Ed 2d 649, 89 S Ct 734 (1965), thereby denying to them the procedural due process required by the Fourteenth Amendment.

"The phrase 'prior restraint' is not a self-wielding sword, nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase must be recognized here." *Kingsley Books* v. *Brown,* 354 US 436, 1 L Ed 2d 1469, 77 S Ct 1325 (1957). In every case cited by the respondents to support their allegation that prior restraint exists here, the term was used either to denote suppression or prohibition of speech protected by the First Amendment, without a judicial determination as to the validity of the prohibition. In the case at bar, "adult" motion pictures, stage performances and press materials are not prohibited. The regulations are addressed to the question "where" adult material should be exhibited; not to the question of when, what or how.

It should also be emphasized that we are considering here not speech in its pure form, either spoken or written, but the regulation of a business which deals in expressive graphic representations which may or may not be accompanied by speech, depicted or described either on the motion picture screen on the stage, or in press materials. It is emphasis on specific sexual *acts* or *anatomical areas* which is the basis of the classification. However, even if the material offered by respondents is classified as "adult", the material itself is never censored or prohibited under Ordinances 742-G or 743-G. An "adult" business, if legally located under the zoning law, and licensed (if required), may disseminate any material without prior restraint. The reasoning of the *Freedman* case is not applicable here as there is no censorship or prior restraint exercised at

any time against the exhibition of any motion picture or stage performance, or dissemination of any press materials under the challenged ordinances.

Respondents' argument that the licensing and zoning regulations on the operation of their businesses indirectly operates as an illegal prior restraint on their First Amendment rights is also untenable. To accept respondents' reasoning, one must ignore all of the following:

1. The City has the right and duty to regulate, by licensing, trades and businesses whose operations affects the public welfare;

2. The City has the right and duty to zone the uses of property in a manner conductive to growth and development of a community and to forestall blight;

3. The City has demonstrated a compelling state interest; i.e., the necessity of regulating the location of certain businesses to a) avoid "clustering" which results in downgrading of business districts and nearby residential neighborhoods; and to b) protect and preserve residential zoning districts by providing a suitable atmosphere for family living and to raise children.

4. That the zoning and licensing regulations are a reasonable exercise of the City's police power directly related to the achievement of a legitimate governmental purpose;

5. That the procedure provided for obtaining a license to operate an adult motion picture theatre as set forth in Ordinance 743-G of the City Code, and Ordinance 742-G of the Official Zoning Code, afford the respondents adequate protection to satisfy the requirements of due pro-

cess of law even though no time limit is specified[6] There is no constitutional requirement that decisions of administrative agencies, such as the licensing bureau or city plan commission, be made within a certain time. However, the requirements of due process will be read into, or implied, in the law when necessary to protect the constitutional rights of the applicant. For example, in *Rydd* v. *State Board of Health*, 451 P 2d 239 (Kansas 1969), the Supreme Court of Kansas ruled that legislation is not rendered constitutionally invalid because of omission of certain procedural safeguards which may be supplied by rule or otherwise by the agency administering the law. The court noted that where no expressed provision for procedural due process is provided in the law, the requirements of reasonable notice and an opportunity to be heard will be implied.

6. Should respondents' constitutional rights to disseminate protected material be arbitrarily denied, or delayed beyond a reasonable length of time in the administrative process, they may seek immediate direct review in the state court of competent jurisdiction, and obtain a Writ of Mandamus or Certiorari in as little time as four days. 1963 Michigan Constitution, Article VI, Secs. 28; 1963 Michigan General Court Rules 710, 711.

> "None of the past decisions have squarely considered wheth parade licenses must be handled on an expedit basis. In *Cox* v. *New Hampshire*, 312 US 569, 85 L Ed 1049, 61 S Ct 762, 133 ALR 1396 (1941), the question was not argued. In *Poulos*

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[6] Ordinance 744-G, relating to the licensing of Group "D" cabarets, (topless, etc.) contained procedural provisions similar to Ordinance 743-G. Ordinance 744-G was upheld by the Michigan Court of Appeals in *Tally* v. *City of Detroit, supra.*

v. *New Hampshire*, 345 U.S. 395, 97 L Ed 1105, 73 S Ct 760, 30 ALR 2d 987 (1953), Poulos' request for a permit to conduct religious services in a public park was refused by the Portsmouth City Council seven and one-half weeks before the first scheduled event. Since the time remaining was sufficient to obtain relief by way of mandamus, see 345 US, at 419-420, 97 L Ed at 1120, 1121, 30 ALR 2d 987 (opinion of Mr. Justice Frankfurter), there was no need to consider whether the State had a constitutional obligation to provide a more rapid procedure. And, of course, those cases which struck down regulatory schemes which purported to issue licenses on the basis of unconstitutional standards did not reach the question presented here. See, e.g., *Lovell* v. *Griffin*, 303 US 444, 82 L Ed 949, 58 S. Ct. 666 (1938); *Schneider* v. *State*, 308 US 147, 163-165, 84 L Ed 155, 165, 166, 60 S Ct 146 (1939); *Largent* v. *Texas*, 318 US 418, 87 L Ed 873, 63 S Ct 667 (1943); *Staub* v. *Baxley*, 355 US 313, 2 L Ed 2d 302, 78 S Ct 277 (1958)." *Shuttlesworth* v. *Birmingham*, at 22 L Ed 2d 74.

As the respondents here are in a position similar to applicants seeking to conduct any business, time is not of the essence, and as they may seek by Writ of Mandamus judicial review of a denial or refusal to act upon their application for a license, they are not denied due process of law. To require that the City, not the respondents, institute proceedings in this situation would be a ridiculous distortion of the ruling enunciated in *Freedman* v. *Maryland, supra.*

7. There is no prior restraint or censorship of any kind exercised over the materials disseminated in an

adult business, after it is legally established under Ordinances 742-G, 743-G or 744-G.

Even assuming, arguendo, that the facts related here in effect impose a prior restraint on the respondents' First Amendment rights, such prior restraint, if any, would not be an invalid regulation of respondents' First Amendment rights. The subject was discussed at length in *Times Film Corp.* v. *Chicago, supra,* where, at page 406, this Court stated:

> "Nor has it been suggested that all previous restraints on speech are invalid. On the contrary, in *Near* v. *Minnesota*, 283 US 697, 715, 716, 75 L Ed 1357, 1367, 51 S. Ct. 625 (1931), Chief Justice Hughes, in discussing the classic legal statements concerning the immunity of the press from censorship, observed that the principle forbidding previous restraint 'is stated too broadly, if every such restraint is deemed to be prohibited. . . . (T)he protection even as to previous restraint is not absolutely unlimited. • • • In addition, the Court said that 'the primary requirements of decency may be enforced against obscene publications' and the 'security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.'" • • •

Thereafter, as we have mentioned, in *Joseph Burstyn, Inc.* v. *Wilson,* 343 US 495, 96 L Ed 1098, 72 S Ct 777, *supra,* we found motion pictures to be within the guarantees of the First and Fourteenth Amendments, but we added that this was 'not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.'"

"And, during the same Term, in *Kingsley Books, Inc.* v. *Brown*, 354 US 436, 441, 1 L Ed 2d 1469, 1473, 77 S Ct 1325 (1957), after characterizing *Near* v. *Minnesota*, 283 US 697, 75 L Ed 1357, 51 S Ct 625, *supra*, as 'one of the landmark opinions' in its area, we took notice that *Near* 'left no doubts that 'Liberty of speech, and of the press, is also not an absolute right . . . the protection even as to previous restraint is not absolutely unlimited.' . . ."

• • •

"Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, Ill Rev Stat (1959), c 38 § 470, and then only after a transgression."

• • •

"Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent, of such an evil, previous restraint cannot be justified. With this we cannot agree.

We recognized in *Burstyn*, 343 US 495, 96 L ed 1098, 72 S Ct 777, *supra*, that 'capacity for evil . . . may be relevant in determining the permissible scope of community control,' at p. 502, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression. 'Each method', we said, 'tends to present its own peculiar problems.' At p. 503. Certainly petitioner's broadside attack does ont warrant, nor

could it justify on the record here, our saying that—aside from any consideration of the other 'exceptional cases' mentioned in our decisions—the State is stripped of all constitutional power to prevent, in "the most effective fashion, the utterance of this class of speech. It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances. *Kingsley Books, Inc.* v. *Brown, supra* (354 US at p. 441)."

The City of Detroit has selected the remedy it deems most effective to cope with the clustering of adult types of businesses and their adverse effect on surrounding neighborhoods. The methods chosen are reasonable and are directly related to the achievement of a legitimate governmental purpose. The limited restraint exercised here, if any, is not an invalid prior restraint on the exercise by respondents of their First Amendment rights.

CONCLUSION

The reality of the extensive problems faced by cities in their attempt to stimulate growth and development while at the same time fighting blight and decay in the neighborhoods has been faced by the City of Detroit. Adoption of "regulated uses" has been determined by the City as the most appropriate method of achieving well-planned urban development. Experience in various sections in New York City and in the City of Detroit, where adult types of entertainment have clustered together in business districts which are immediately adjacent to residential communities, resulting in a downgrading of the neighborhood has dictated that adult types of entertainment be classified as "regulated uses." To ignore this fact is to blindly ignore what is happening in our cities today, and fail in the city's duty to provide rational, intelligent, protective city planning. The law should not be powerless to exert its force in situations where, under the guise of First Amendment rights, indulgence is sought in acts which are primarily profit making and only incidentally an expression of First Amendment rights, and which clearly and unmistakably adversely affect the rights of citizens who are unable to protect themselves.

The new provisions of Ordinances 742-G (as now amended by Ordinance 891-G) and 743-G of the City of Detroit were enacted in response to a compelling, substantial interest of the City in the welfare of its citizens; it is a reasonable proper exercise of the City's police powers, and the regulations are directly related to the achievement of a legitimate governmental purpose. Petitioners respectfully submit that they are, therefore, constitutional and should be upheld.

RELIEF

WHEREFORE, Petitioners respectfully pray that this Honorable Court declare the provisions of Ordinances 742-G (as now amended by Ordinance 891-G), and 743-G to be constitutionally valid; reverse the decision of the Court of Appeals, and affirm the decision of the trial court.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 75-312

COLEMAN A. YOUNG, Mayor of the City of Detroit, et al.,
Petitioners,

v

AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation,
Respondents.

— — —

COLEMAN A. YOUNG, Mayor of the City of Detroit, et al.,
Petitioners,

v

NORTOWN THEATRE, INC.,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT NORTOWN THEATRE, INC.

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IN THE

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BRIEF FOR RESPONDENT NORTOWN THEATRE, INC.

OPINIONS BELOW

The opinion of the Court of Appeals (App A, pp 15-39) is not reported. The opinion of the District Court (App. D, pp 43-60) is reported at 373 F Supp 363.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App. B, pp 40-41) was entered on June 16, 1975. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 32.0007 Of The Official Zoning Ordinance Of The City Of Detroit (Ord. 742-G) And Section 5-2-1.2 Of The Detroit Municipal Code (Ord. 743-G) Are, As Written And/Or As Applied, Void For Vagueness And/Or Overbreadth?

2. Whether Ordinance Nos. 742-G And 743-G Of The Ordinances Of The City of Detroit Are Unconstitutional As Written And/Or Applied In That Same Fail To Meet The Requisites Of Procedural Due Process And Constitute An Unlawful Prior Restraint Upon The Exercise Of Respondent's Rights Under The First And Fourteenth Amendments To The Constitution Of The United States?

3. Whether Ordinance Nos. 742-G And 743-G Of The Ordinances Of The City Of Detroit, As Same Purport To Regulate The Establishment Of "Adult" Businesses In The City Of Detroit, Are Violative Of The First Amendment To The Constitution Of The United States And Repugnant To The Equal Protection Clause Of The Fourteenth Amendment, As Written And/Or As Applied, In That, By Their Terms, The Statutory Classification Is Grounded Upon The Content Of The Materials And Further, Said Statutory Classification Is

Not Rationally Related To A Valid Public Purpose Nor Necessary To The Achievement Of A Compelling State Interest?

4. Whether Ordinance Nos. 742-G And 743-G, Of The Ordinances Of The City Of Detroit, Insofar As Same Purport To Regulate The Establishment of Motion Picture Theatres In The City of Detroit, Are Repugnant To The First And Fourteenth Amendments To The United States Constitution In That Same, By Their Terms, Place A Forbidden Burden Upon The Exercise Of The Right Of Free Speech In That Said Ordinances Regulate Expression Absent Any Valid And/Or Recognizable Compelling State Interest And/Or If There Exists A Compelling State Interest Which Is Legitimate And Substantial In Regulating Motion Picture Theatres In The City Of Detroit, Whether Same Are Void For Impermissible Overbreadth By Employing Means Which Sweep Unnecessarily Broadly And Thereby Invade The Area Of Protected Freedoms?

5. Whether Section 5-2-1.2 Of The Code Of The City Of Detroit, As Same Pertains To The Issuance Of A License To Operate An "Adult" Motion Picture Theatre, Is Repugnant To The First, Fourth, Fifth And Fourteenth Amendments To The Constitution Of the United States As Written And/Or Applied In That The Standards Enumerated Therein Are Vague And Ambiguous And Thus Totally Incapable Of Objective Measurement, Thereby Vesting The Mayor Of The City Of Detroit With Virtually Unlimited Discretionary Power To Grant Or Refuse A License, And Effectively Imposes A Prior Restraint Upon The Exercise Of First Amendment Rights?

CONSTITIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitution of the United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. . . ."

STATEMENT OF THE CASE

On November 2, 1972, the City of Detroit enacted Ordinance No. 742-G (App G, p 65) by amending the official Zoning Ordinance of the City of Detroit, and Ordinance No. 743-G (App H, p 80) amending the Municipal Code of the City of Detroit.

On the 21st day of December, 1972, responded obtained a general theatre license to operate a motion picture thea-

tre at 7706 E. Seven Mile Road, Detroit, Michigan. As a condition of the issuance of said license, the theatre building was required to meet all of the health, safety and building standards specified by the City of Detroit.

On the 1st day of March, 1973, respondent Nortown Theatre, Inc. commenced operating the premises as a motion picture theatre. The premises had been in existence and had been operated as a motion picture theatre since 1938 and had commonly been known in the City of Detroit as the Nortown Theatre for over 30 years and during that time had continuously exhibited motion picture films to the public on the premises.

On the 7th day of March, 1973, the Office of the Corporation Counsel for the City of Detroit notified respondent by letter, that it had come to the attention of the Corporation Counsel's Office that the Nortown Theatre had adopted a policy of exhibiting so-called "adult" films without first complying with Ordinances 742-G and 743-G. Respondent was also notified that any business which operates in violation of a municipal zoning ordinance is, by state law, a nuisance *per se,* which may be enjoined by court order, and unless respondent complied with the said zoning and licensing regulations forthwith, the City of Detroit would begin legal proceedings to enjoin the operation of the Nortown Theatre as an adult motion picture theatre.

Following such notification, the respondent, Nortown Theatre, Inc. claimed its constitutional rights under the First, Fifth, and Fourteenth Amendments were threatened by the proposed action of the various City officials, and on March 14, 1973, sought declaratory and injunctive relief in the Federal District Court, Eastern District of Michigan, under 42 USC 1983. The jurisdiction of the

Court was invoked under 28 USC 1331 and 28 USC 1343(3).

This case was consolidated for argument with another cause of action instituted in the same District Court entitled, *American Mini Theatres, Inc., et al. v Roman Gribbs, et al.,* Civil Action #40198.

On the 22nd day of March, 1974, Judges Lawrence Gubow and Cornelia G. Kennedy issued a joint Opinion upholding the constitutionality of the ordinances in part and ruling said ordinances invalid and unconstitutional in part. (App D, pp 43-60). On the 25th day of April, 1974, an Order was signed by the Honorable Lawrence Gubow in conformance with the decision (App E, pp 61-62).

A Notice of Appeal was filed by the plaintiff Nortown Theatre, Inc., respondent herein on the 20th day of May, 1974. No appeal was taken by defendants, petitioners herein.

On June 16, 1975, the Sixth Circuit Court of Appeals issued a decision striking down the ordinances as violative of the Free Speech and Press provisions of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. (App A, pp 15-39). Judgment was entered the same day. (App B, p 40).

On July 18, 1975, a Stay of Mandate was issued by the Hons. Edwards, Celebrezze and Lively, the panel which decided the case in the Court of Appeals. (App C, p 42).

A Petititon for Certiorari was filed with the United States Supreme Court on August 28, 1975, and Certiorari was granted on October 20, 1975.

SUMMARY OF ARGUMENT

Whatever the label the state places upon legislation, where a regulation infringes upon fundamental rights, it must meet certain constitutional requisites in order to be held valid. These requisites are no less applicable to municipal zoning ordinances where, under the guise of economic and social legislation, fundamental rights are impinged. Unlike the circumstance in *Village of Belle Terre v Boraas,* 416 US 1 (1974), the zoning ordinances in question are aimed directly at a fundamental constitutional right. Freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive and the right to read. *Griswold v Connecticut,* 381 US 479 (1965), at pp 482-483.

If, "the state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge," *Griswold v Connecticut, supra,* it may not, by means of a zoning ordinance, restrict the right to distribute and the right to receive by restricting the means by which books, magazines or films are distributed to, and received by, the public, particularly where, as here, a theatre or bookstore bears a necessary relationship to that aspect of free speech and press. *Schneider v State,* 308 US 147 (1939).

The ordinances in question place a selective burden upon "adult" bookstores and theatres. Because Detroit treats some bookstores and theatres differently than others and does so by classification formulated in terms of the subject matter or content of the press materials intended to be sold or exhibited by the theatre or bookstore, the ordinances must be analyzed in terms of the equal protection clause of the Fourteenth Amendment, which mandates that a

classification promulgated by a state or municipality be reasonable and rest upon some ground of difference having a fair and substantial relationship to the object of the legislation. The crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. *Police Department of the City of Chicago v Mosely,* 408 US 92 (1972) at p 95; *Reed v Reed,* 404 US 71 (1971) at pp 75-77.

Petitioners assert that the zoning ordinances are aimed at the conduct of the business, not the press materials which the business intends to disseminate, and premise their argument on the test enunciated by this Court in *United States v O'Brien,* 391 US 367 (1968). However, the ordinances themselves emphasize the word "adult", and that is defined on the basis of the content of the materials intended to be disseminated on the premises. Thus, these zoning regulations cannot be justified as a regulation of conduct where the "conduct" is the expression itself.

United States v O'Brien, supra, at p 382;
Cohen v California, 403 US 15 (1971) at pp 18-19.

Where, as here, the government, acting as a censor undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. *Erznoznik v City of Jacksonville,* 422 US 205 (1975) at p 209.

Since the ordinances affect a fundamental right, they are unconstitutional unless the state can demonstrate that these ordinances are necessary to promote a compelling governmental interest, and further, that the regulatory scheme chosen is the least drastic among reasonable ways to achieve its objectives. *Dunn v Blumenstein,* 405 US 330 (1972); *Eisenstadt v Baird,* 405 US 438 (1972); *Shelton v Tucker,*

364 US 479 (1960); *Police Department of the City of Chicago v Mosely, supra* at p 102, Note #8; *Village of Belle Terre v Boraas, supra,* dissenting opinion, Justice Marshall, p 18.

Petitioners maintain that bookstores and theatres intending to sell or exhibit "adult" press materials may be prohibited from certain areas of the City even though the press materials are fully entitled to the protection of the First Amendment, and justify this contention on the grounds that the City of Detroit has a valid interest in protecting and preserving the residential areas of the City and the business districts which serve them. Upon closer examination however, the rationale asserted by petitioners amounts to no more than ". . . An undifferented fear or apprehension . . ." which this Court has ruled was ". . . not enough to overcome the right to freedom of expression." *Police Department of the City of Chicago v Mosely, supra,* at p 101; *Cohen v California, supra,* at p 23. The city's basic premise, upon which these ordinances are grounded, would support restrictions upon virtually any kind of press material of a controversial nature. Such considerations cannot, under the First Amendment, justify the sweeping effect of these ordinances.

The effect of the ordinances is to prevent the establishment of new bookstores and theatres selling or exhibiting materials which are presumptively protected by the First Amendment and to deter existing theatres and bookstores from offering for sale or exhibition press materials which have never been found to be obscene by a prior judicial adversary hearing on that issue, *Marcus v Search Warrant,* 367 US 717 (1961); *A Quantity of Books v Kansas,* 378 US 205 (1964); and therefore are entitled to the full protections of the First Amendment. The City of Detroit is in effect, using the sledgehammer in an area which this Court has

said requires the most sensitive of tools, *Speiser v Randall,* 357 US 513 (1958). The ordinances operate to suppress, on the basis of past experience, i.e., established bookstores and theatres of an assumed "similar" nature, the distribution of press materials presumptively protected by the First Amendment and is thus a classic example of a prior restraint. *Near v Minnesota,* 283 US 697 (1931); *Organization for a Better Austin v Keefe,* 402 US 415 (1971). A community may not, consistent with the First Amendment, wall itself off from speech which, directly or indirectly, is presumed to be offensive to that community. See *Organization for a Better Austin v Keefe, supra,* at pp 418-420.

Each of the additional problems mentioned in Petitioners' Brief and supporting affidavits, i.e., increase in street crimes, prostitution and dope peddling, illegal parking, obscene materials in the possession of children, can be regulated by criminal statutes and ordinances already in force. Indeed, these ordinances are designed to obviate the necessity of resorting to the criminal law.

We are thus left with an ordinance which classifies those motion picture theatres and bookstores which fall within its regulatory purview and those which do not on the basis of the content of the press materials intended to be sold and/or exhibited. "The operative distinction is . . ." the image on the screen. "But above all else, the First Amendment means that government has no power to restrict expression, because of its message, its ideas, its subject matter or its content." *Police Department of the City of Chicago v Mosely, supra.*

The classification itself is so vague and idefinite that it fails to give fair warning as to what is prohibited in that the bookstore or theatre operator is given no notice as to the regulatory scope of the provisions in question.

Even stricter standards of precision and clarity are required where a regulation is capable of reaching expression protected by the First Amendment. *Grayned v City of Rockford,* 408 US 104 (1972); *Smith v California,* 361 US 147 (1959). This same standard of precision and clarity is applicable where the regulation of expression is one of classification rather than prohibition. *Interstate Circuit v Dallas,* 390 US 176 (1968).

As a zoning regulation, Ordinance No. 742-G would apply to every existing bookstore and theatre in Detroit as well as any proposed bookstore or theatre. It would apply to a bookstore or theatre attempting to establish itself in a certain area of the city, a theatre or bookstore desiring to move down the street, one wanting to move next door, one wishing to expand, and all existing bookstores or theatres intending to offer for sale or exhibition "adult" press materials, as defined in the ordinances.

However, there is no way of determining at what point and in what context, the ordinances at issue are triggered, for there is no way of determining with any degree of accuracy or precision, at what point—both in the context of the press materials offered for sale or exhibition and in the context of the amount and/or length of time, quantitatively, the press materials are offered for sale and/or exhibition—a bookstore or theatre qualifies as "adult." Absent any definitional standards, the theatre or bookstore operator is forced to act at his peril. Since he cannot determine at what point and in what context his bookstore or theatre becomes "adult" he must, of necessity, steer far wider of the forbidden zone. In such a circumstance, he may choose the inane or innocuous rather than run the risk of criminal or civil sanction. *Interstate Circuit v Dallas, supra.*

If "precision of regulation must be the touchstone" whenever a regulation touches upon First Amendment rights, *Interstate Circuit v Dallas, supra; N.A.A.C.P. v Button,* 371 US 415 (1963), the ordinances in question fall far short of the requisite specificity necessary to sustain their validity.

The regulations also sweep within their ambit, protected expression, and are therefore void for overbreadth. *Grayned v City of Rockford, supra,* at p 115.

Books, magazines and motion picture films are a form of exprssion protected by the First Amendment to the Constitution of the United States. *Erznoznik v City of Jacksonville,* 422 US 205 (1975); *Kaplan v California,* 413 US 115 (1973). As such, they are not subject to regulation, where that regulation is grounde pon the substantive message conveyed—in the context of their sexual content—until found to be obscene. *Miller v California,* 413 US 15 (1973); *Roth v United States,* 354 US 476 (1957). In *Miller v California, supra,* the Supreme Court specified the test to be applied in judging whether a particular work was obscene. Clearly, the ordinances at issue define "adult" in terms far more restrictive than the *Miller* formulation.

Petitioners concede that the ordinances in question sweep far beyond the permissible restraints on obscenity and thus, apply to press materials that are protected by the First Amendment. Nevertheless, petitioners justify this on the grounds that the City of Detroit has a valid interest in protecting and preserving the residential areas of the city and the business districts which serve them, and therefore may regulate and restrict the influx of "adult" businesses because of the alleged "adverse effects" caused by the operation of the business dealing in "adult" materials. As has been said, this amounts to no more than an ". . . un-

differentiated fear or apprehension . . ." *Cohen v California, supra,* at p 21; *Police Department of the City of Chicago* v *Mosely, supra,* at p 101, which the Court has held to be insufficient to overcome the right to freedom of expression.

The city may not, in the name of preserving neighborhood stability, avoiding blight and decay, and providing a suitable atmosphere for family living, shut off discourse, though disquieting and even offensive. *Organization for a Better Austin v Keefe, supra.*

The form of expression in the case at bar, as defined by the ordinances, is not subject to regulation. The ordinances can be justified, if at all, only as a valid regulation of the manner in which freedom of speech is exercised, not as a permissible restriction on the substantive message intended to be conveyed. *Cohen v California, supra,* at pp 19-24. However, the zoning ordinance itself describes that which is subject to regulation not in terms of time, place and manner, but in terms of subject matter.

The operation and effect of the ordinance is clear; they are aimed at the restriction and suppression of free expression, the effect of which is the essence of censorship.

In addition, the ordinances create and establish a procedure which fails to meet any of the requisites of procedural due process and thus constitutes an unlawful prior restraint.

Section 66.0000 of Ordinance No. 742-G of the Official Zoning Ordinance of the City of Detroit prohibits the establishment of a business defined as a "regulated use" where there are two existing businesses defined as "regulated uses" within 1,000 feet of the location of the proposed business. This prohibition may be waived by an admini-

strative agency, the City Plan Commission, if certain findings are made by that agency. Those businesses defined as "regulated uses" include "adult" bookstores and theatres, as defined in the ordinances.

Not all prior restraints are unconstitutional *per se. Southeastern Promotions, Ltd v Conrad,* 420 US 546 (1975). However, any system of prior restraint comes to the court bearing a heavy presumption against its constitutional validity. *Bantam Books v Sullivan,* 372 US 58 (1963) ". . . a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards. *First,* the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second,* any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third,* a prompt final judicial determination must be assured." *Southeastern Promotions, Ltd v Conrad, supra,* at p 560.

These criteria are applicable to the case at bar, for the ordinances give to public officials the power to deny use of a forum in advance of actual expression. *Southeastern Promotions, Ltd. v Conrad, supra,* at p 553. Indeed, all the elements of prior restraint which the Supreme Court identified and enumerated in *Southeastern Promotions, Ltd. v Conarad, supra,* at p 554, are present in the system chosen by the City of Detroit, through an administrative agency, to regulate the establishment and use of motion picture theatres and bookstores, for "One seeking to use a theatre . . . [to exhibit 'adult' films] . . . was required to apply to the . . . [City Plan Commission] . . . The . . . [City Plan Commission] . . . was empowered to determine whether the applicant should be granted permission—in effect a license or permit—on the basis of its review of the content of the . . . [press materials proposed to be

exhibited on the premises] . . . Approval of the applicant depended upon the . . . [City Plan Commission's] . . . affirmative action. Approval was not a matter of routine; instead, it involved the 'appraisal' of facts, the exercise of judgment, and the formation of an opinion by the [City Plan Commission]. . . ."

Turning to the ordinances in question, the burden of going forward is placed upon the applicant at every step of the administrative procedure. If the agency rules adverse to the applicant, he may seek relief in court. However, the burden is substantially greater and judicial review is limited to the question of whether or not the administrative agency acted arbitrarily or abused its discretion. Michigan Constitution (1963) Art. VI § 28; *Indian Village Manor Co. v Detroit,* 5 Mich App 679 (1967); *Mazo v City of Detroit,* 9 Mich App 354 (1968).

Additionally, the guidelines to be applied by the administrative agency are so vague and ambiguous that the available judicial review is, in effect, meaningless. *Interstate Circuit v Dallas, supra,* at pp 684-85. Nor is there a time limit within which the administrative agency must issue a ruling.

The delay and uncertainty inherent in the procedural process created by the ordinances in question would have the effect of discouraging a theatre or bookstore operator from offering for sale or exhibition press materials of an alleged "adult" nature on the premises. The City of Detroit, ". . . [can] . . . not escape the obligation to afford appropriate procedural safeguards." The provisions do not "assure prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances," *Southeastern Promotions, Ltd v Conrad, supra,* and as such, is an unconstitutional prior restraint upon

respondent's rights under the First and Fourteenth Amendments to the Constitution of the United States.

Contrary to Petitioners' assertion, the effect of these zoning ordinances on free speech and press is not incidental but is immediate, direct and stifling.

The zoning ordinance would apply to a threatre or bookstore intending to sell or exhibit "adult" material which wishes to open in a certain area of the city. They would also apply to an existing theatre or bookstore which wishes to relocate down the street, or one desiring to expand next door. Indeed, as the "use" is defined in terms of the content of the press materials, they would apply to an existing theatre or bookstore which wishes to exhibit or sell press materials defined as "adult"—the factual circumstance now before the Court regarding the Nortown Theatre.

The theatre or bookstore operator is required to state his future intent. However, it would be virtually impossible for him to know in advance what books will be printed or what films will be produced and indeed, what kind of press materials will be made available to him. He is therefore faced with a Hobson's choice. He either limits himself to the innocuous and non-controversial, or, in order to give himself the widest possible latitude in offering press materials to the public, and rather than run the risk of finding himself in the position of running afoul of criminal or civil sanction, or both, he may feel compelled to comply with the ordinances in question. His option is then to act as his own censor or to subject himself to regulations which are inherently vague and a procedure which is fraught with delay and uncertainty. The precarious position of the bookstore or theatre operator becomes even more evident when one considers the nature of the threat of criminal and/or civil sanction.

The official Zoning Ordinance of the City of Detroit specifies that a violation of same shall subject the violator, upon conviction to a fine of not more than $500.00 or to imprisonment for no more than 90 days and further specifies that each day that a violation continues shall constitute a separate offense. (Section 69.0000.)

In addition, the applicable statutes of the State of Michigan permit a building, upon a finding that the use to which it is put is in violation of a municipal zoning ordinance, to de deemed a nuisance *per se* and to be abated forthwith. (M.C.L.A., §125.578.)

The only question before a court in either a criminal or civil proceedings is whether the "use" is "adult" as that term is defined by the zoning ordinance in question. As such, absolute criminal and/or civil responsibility is imposed by operation of these ordinances, for the question is not whether the theatre or bookstore operator *knowingly* operated an adult bookstore or theatre but merely whether he did, in fact, operate an "adult" bookstore or theatre.

The potential threat imposed by the strict or absolute responsibility features of Ordinance No. 742-G, criminally or civilly, would be too great a burden upon the exercise of free speech and press for it would have the effect of severely limiting the public's access to constitutionally protected materials. *Smith v California, supra.*

It is clear that, though labelled zoning regulations, Ordinances No. 742-G and No. 743-G are aimed directly at expression *per se,* and infringes upon fundamental personal rights. The regulations cannot be, and have not been, justified as necessary to protect a compelling and substantial governmental interest. Nor has it been demonstrated that the means chosen to accomplish the end are the least intrusive. Finally, the effect upon free speech and press

is not incidental. On the contrary, the effect of the ordinances on First Amendment rights is direct, immediate and stifling. These regulations would permit, in the name of conservation of business and residential property values, and preservation of neighborhood stability, discourse to be shut off, debate to be stilled and the most basic and most fundamental of our rights to be irrevocably weakened. They are unconstitutional abridgement of free speech and press.

ARGUMENT

I.

SECTION 32.0007 OF THE OFFICIAL ZONING ORDINANCE OF THE CITY OF DETROIT (ORD. 742-G) AND SECTION 5-2-1.2 OF THE DETROIT MUNICIPAL CODE (ORD. 743-G) ARE, AS WRITTEN AND/OR AS APPLIED, VOID FOR VAGUENESS AND/OR OVERBREADTH.

It is elementary that in the area of First Amendment freedoms, a vague statute or ordinance is repugnant to the constitutional provisions guaranteeing those freedoms.

The constitutional requirement of precision and clarity proceeds from the concept that an individual ought to be adequately warned that sanctions will attach to future conduct he might be contemplating, and that such warning may not issue in a form that men of common intelligence must necessarily guess as to its meaning and differ as to its application. *Papachristou v City of Jacksonville*, 405 US 156 (1972); *Coates v Cincinnati*, 402 US 611 (1971). See also *Conally v Gen. Constr. Co.*, 269 US 385 (1927); *Winters v New York*, 333 US 507 (1948); *Lanzetta v New Jersey*, 306 US 451, 453 (1939). Aside from the notice requirement, concern over vague criteria arises from the

fear of the potential for government abuse and uncertainty of application that is afforded. *Papachristou* v *City of Jacksonville, supra.*

Stricter standards of precision are required where a regulation is capable of reaching expression protected by the First Amendment.

Smith v Gougen, 415 US 566 (1974), at p 572-573:

> ". . . the due process doctrine of vagueness . . . incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts. . . . "

In *Grayned v City of Rockford*, 408 US 104 (1972) at pp 108-9, the Supreme Court stated:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic

> policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

And the court also said, at p 109, Note #5:

> "Where First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed,' Edwards v South Carolina, 372 US 229, 236, 9 L Ed 2d 697, 702, 83 S Ct 680 (1963), assures us that the legislature has focused on the First Amendment interests and determined the other governmental policies compel regulation . . . . "

In *Smith v California*, 361 US 147 (1959), the United States Supreme Court stated:

> "And this court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

These same standards were applied where the regulation of expression at issue was one of classification rather than prohibition. *Interstate Circuit v Dallas*, 390 US 676 (1968). The court found that "The absence of narrowly

drawn, reasonable and definite standards for the officials to follow", invalidated the ordinance.

Turning to the definition of the terms, "adult bookstore" and "adult motion picture theatre" as set out in Petitioners' Brief, at pp 44-45, it is clear that the actual or potential bookstore or theatre operator is set adrift upon a boundless sea. An "adult" bookstore is one having, " . . . as a substantial or significant portion of its stock in trade, books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter . . . " as therein defined in said ordinance, "or an establishment with a segment or section devoted to the sale or display of such material." What is meant by, " . . . a substantial or significant portion . . . "? And who is to make that determination? Does "substantial or significant" mean a certain percentage of the press materials offered for sale or does it mean a percentage of sales of the establishment? And how much and to what degree, both quantitatively and qualitatively are press materials allowed to depict or describe by word or picture the naked body before they are deemed to be " . . . distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas'? And who is to determine this? Must a bookstore owner read every book, view every magazine, see every movie? And if he did, what formula, what readily ascertainable standard must he apply assuming it was possible to do so? If an "adult book store" is defined additionally or alternatively as an "establishment with a segment or section devoted to the sale or display of such material", how many books and magazines—as well as what kind—constitutes a "segment or section . . . "? Has a corner drug store which keeps certain magazines separated and away from children because they deal with nudity, or, indeed.

under the counter and available to the general public upon request, established a "segment or section devoted to the sale or display of such material"? Does a book seller who —for whatever reason—separates and classifies books and magazines based upon theme or content create such a "segment or section"? Virtually every store offering books, magazines or periodicals for sale or display could potentially fall within the purview of these regulations.

The inherent vagueness of the terms are even more strikingly apparent—and the burden upon the exercise of First Amendment Rights is equally as great—when one considers the definition of an "adult motion picture theatre." It is defined as "an enclosed building . . . used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.' ". At what point does a theatre become a "building used for presenting material . . . " of a certain content? Does this depend upon the content of the film itself or the length of time the film or films are exhibited at the theatre? Would a theatre which exhibits one film which falls within the regulatory purview of the ordinance—assuming that can be determined—for one week of the year constitute a "building used for presenting material . . . " of a certain kind? And what of a theatre that exhibits one film for ten weeks of the year or one that exhibits six films which may fall within the regulatory purview of the ordinance for two weeks per film within a year's span of time? Additionally, what would be the films which would fall within the regulatory purview of the ordinances? A film which depicts nudity—of which there are many—would arguably fall within the definitional purview of the materials sought to be regulated. The basic problem is that nothing in the ordinance defines at

what point the regulatory mechanism of the ordinance is triggered. This is compounded by the fact that as a zoning ordinance, the regulation speaks in terms of a *proposed* use, i.e., one that is not in existence but is contemplated, and therefore requires that a potential theatre or bookstore operator state his intentions as to the content of press materials he will offer for sale, display or exhibition on his premises for an indeterminant time into the future with virtually no way of knowing what will be available for sale, display or exhibition in the future, nor what qualitatively and quantitatively constitutes the press materials subject to regulation nor how much, quantitatively, he may offer for sale, display or exhibition before the premises are deemed "adult". Yet, he is required to conform his conduct to such a "norm" under threat of criminal and/or civil sanction, a norm which is virtually impossible to determine and does not exist.

In addition, should one who operates or wishes to operate an "adult" theatre or bookstore, file an application, the guidelines to be applied by the administraitve agency are inherently incapable of precision and are vague and ambiguous. Section 66.0000 of Ordinance 742-G of the Official Zoning Ordinance of the City of Detroit establishes a prohibition to an additional business defined as a "regulated use" by the ordinance where there are two existing "regulated uses" within 1,000 feet of the proposed use. Pursuant to Section 66.0101, this prohibition may be waived by the City Plan Commission if the following findings are made by that administrative body: (App G, p 68)

> "a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.

b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.

d) That all applicable regulations of this Ordinance will be observed."

But how can one measure, with any degree of acuracy —prior to application of the standard—whether a proposed use will be, "contrary to the public interest or injurious to nearby properties?" What is the public interest referred to? In what context is it to be judged? And who is to make such a judgment and what criteria are to be applied? What "properties" is the ordinance speaking of? How far is "nearby" and what is meant to be "injurious"? "Injurious" to whom? And how can a proposed use gauge, with any degree of accuracy, whether it will "encourage the development of a 'skid row' area"? What is a skid row area? How could a use *encourage* its development? How do you determine whether a certain use to which property is put —*before* that property is put to the intended use—would, "encourage the development of . . ." a certain kind of area?

Initially, the theatre or bookstore operator is required to be his own censor. He is required to forego the exercise of his First Amendment rights lest he fall within the purview of the ordinances and thereby subject himself and his business to criminal or civil penalty.

Should the theatre or bookstore operator submit an application pursuant to the ordinance, an administrative agency is empowered to apply the requisite criteria and

thus, acts in the role as censor. At each stage the theatre or bookstore operator or the administrative body empowered to act, is required to apply criteria inherently incapable of objective determination.

The result would be no differnt than that envisioned by the court in *Interstate Circuit v Dallas, supra,* at p 684:

> "The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing. It may be unlikely that what Dallas does in respect to the licensing of motion pictures would have a significant effect upon film makers in Hollywood or Europe. But what Dallas may constitutionally do, so may other cities and States. Indeed, we are told that this ordinance is being used as a model for legislation in other localities. Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than run that risk, he might choose nothing but the innocuous, perhaps save for the so-called 'adult' picture. Moreover, a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults—perhaps a 'Viva Maria'—may contract to show only the totally inane. The vast wasteland that some have discribed in reference to another medium might be a verdant paradise in comparison."

If "precision of regulation must be the touchstone", whenever a regulation touches upon First Amendment rights, *Interstate Circuit v Dallas, supra; N.A.A.C.P. v Button,* 371 US 415 (1963), the ordinances in question fall far short of the requisite specificity needed to uphold their validity and as such, are void for vagueness.

On the other hand, though the definition of whether press materials are, "distinguished or characterized by an emphasis" on certain matter is vague and indefinite quantitatively and qualitatively, the definition of the nature or content of the material to which the regulation applies is definite and specific. The press materials subject to regulation are defined in terms of their sexual and/or anatomical content. And in this context, the ordinances are void for impermissible overbreadth.

"A clear and precise enactment may . . . be 'overbroad' if in its reach it prohibits constitutionally protected conduct . . . The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned v City of Rockford, supra,* at pp 114-115.

And in *Gooding v Wilson,* 405 US 518:

> "The constitutional guarantees of freedom of speech forbid the States from punishing the use of words or language not within 'narrowly limited classes of speech.' Chaplinsky v New Hampshire, 315 US 568, 86 L Ed 1031, 1035, 62 S Ct 766 (1942). Even as to such a class, however, because 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn, Speiser v Randall, 357 US 513, 525, 2 L Ed 2d 1460, 1472, 78 S Ct 1332 (1958), '[i]n every case the power to regulate must

> be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom,' Cantwell v Connecticut, 310 US 296, 304, 84 L Ed 1213, 1218, 60 S Ct 900, 128 ALR 1352 (1940). In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' "

In *Broadrick v Oklahoma,* 413 US 601 (1973), this court reviewed the overbreadth doctrine in the context of First Amendment rights, stating, at pp 612-615:

> "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society . . . As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Dombrowski v Pfister, 380 US, at 486, 14 L Ed 2d 22. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to re-

frain from constitutionally protected speech or expression.

Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.' In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. . . . Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place and manner of expressive or communicative conduct, . . . and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights. . . .

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. . . .

It is beyond question that motion picture films, books and magazines are a form of expression protected by the

First Amendment to the Constitution of the United States. *Erznozink v City of Jacksonville,* 422 US 205, (1975); *Kaplan v California,* 413 US 115, (1973) at pp 119-20; *Interstate Circuit v Dallas, supra;* at p 682; *Freedman v Maryland,* 380 US 51, (1965); *Roth v United States,* 354 US 476 (1957); *Joseph Burstyn, Inc. v Wilson,* 343 US 495 (1952). And it is equally beyond question that books, magazines or motion picture films are not subject to regulation where that regulation is grounded upon the substantive message conveyed—in the context of their sexual or erotic content—unless and until it is deemed to be obscene. *Miller* v *California,* 413 US 15 (1973); *Roth v United States, supra.*

In *Roth v United States, supra,* the basic question for decision was whether the publication and sale of obscene material, however defined, could be criminally punished in light of First Amendment guarantees. The court ruled that obscenity was not protected and stated:

> "However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.
>
> . . .
>
> The fundamental freedoms of speech and press have contributed greatly to the development and well being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must

be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press material which does not treat sex in a manner appealing to a prurient interest."

In *Miller v California, supra,* the court enunciated the test to be applied in judging whether a book, magazine or film is obscene and outside the purview of First Amendment protections:

> "State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc. v Dallas, supra, 390 US at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value."

The ordinances at issue regulate the establishment of "adult" motion picture theatres and bookstores in the City of Detroit and define the term "adult" in the context of the content of the expression intended to be offered for sale, display and/or exhibition on the premises. In purporting to regulate the establishment of said businesses in the City of Detroit, Sections 32.0007 of Ordinance 742-G and Section

5-2-1.2 of Ordinance No. 742-G omit entirely the standards for judging press materials to be obscene. Though "adult" is defined in terms of content, *i.e.,* the depiction or description of sexual conduct or anatomical area, this definition in no way approximates the test of obscenity as specified in *Miller v California, supra.* Indeed, petitioners concede that the ordinances in question sweep far beyond the permissible restraints on obscenity and thus, apply to press materials that are protected by the First Amendment. See *Erznoznik v City of Jacksonville, supra.* Page 22 of Petitioner's Brief reads, "Obscenity is not an issue in the case at bar."

Nevertheless, petitioners maintain that businesses intending to offer press materials for sale, display and/or exhibition may be prohibited from certain areas of the City of Detroit (which prohibition may be waived) even though the press materials intended to be sold or exhibited are not obscene and therefore, fully entitled to the protection of the First Amendment. Petitioners justify this contention on the grounds that the City of Detroit has a valid interest in protecting and preserving the residential areas of the city and the business districts which serve them.

This amounts to no more than an undifferentiated fear or apprehension which the court, in various contexts, rejected as a rationale for overcoming First Amendment rights. *Tinker v Des Moine Indep. School District Community School District,* 393 US 503 (1969); *Cohen v California,* 403 US 15 (1971), at p 23; *City of Chicago Police Dept. v Mosely,* 408 US 92 (1972), at pp 100-101. The City of Detroit may not, consistent with the First Amendment attempt to create a barrier, by means of ordinances of this nature, to the free flow of press materials to the public even though the press materials do not meet standards of acceptability or because of their presumed offensive

nature. *Organization for a Better Austin v Keefe*, 402 US 415 (1971) at pp 418-420; *Cohen v California, supra*, at p 21.

What the City of Detroit has done is to create a third category of speech, protected but subject to regulation. Yet in the context of the substantive message it conveys, either speech is fully protected or it is not protected at all. *Cohen v California, supra.* This court has never countenanced any other alternative; it should not do so in the case at bar, for if as a rationale for shutting off discourse, speech of a sexual nature is said to be disquieting and not conducive to the continued stability of a neighborhood, it is but a step—in the name of preserving the tranquility and stability of any ethnic or religious area—to permitting the state to shut off speech disquieting to that area. And it is but a step to similar restrictions on bookstores or movie theatres selling or exhibiting other controversial types of books or films. The regulation of "motorcycle" movies could be justified by fear of motorcyclists disturbing the neighborhood, "youth cult" movies by fear of long-haired young people entering the neighborhood, filming depicting excessive violence by the fear that they might induce violence and crime, "black-exploitation" films, especially in white neighborhoods, because of racially stimulated fears.

The ordinances define the press materials in terms substantially more restrictive than the definition of obscenity. Petitioners concede they sweep far beyond these permissible restraints on obscenity, and as such, are clearly capable of reaching press materials which are not subject to state regulation. The regulations, by their . . . plain terms [are] not easily susceptible to a narrowing construction . . . " And, " . . . particularly where as here . . [Petitioners] . . . offer several distinct justifications for the

ordinance[s] in . . . [their] . . . broadest terms, there is no reason to assume that the ordinance[s] can or will be decisively narrowed." *Erznoznik v City of Jacksonville, supra,* at p 217. Since the ordinances, as written, sweep within their purview that which may not be regulated under the First and Fourteenth Amendments to the Constitution of the United States, they are void for overbreadth and should be invalidated on their face.

II.

ORDINANCE NOS. 742-G AND 743-G OF THE ORDINANCES OF THE CITY OF DETROIT ARE UNCONSTITUTIONAL AS WRITTEN AND/OR APPLIED IN THAT SAME FAIL TO MEET THE REQUISITES OF PROCEDURAL DUE PROCESS AND CONSTITUTE AN UNLAWFUL PRIOR RESTRAINT UPON THE EXERCISE OF RESPONDENT'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Section 66.0000 of Ordinance 742-G of the Official Zoning Ordinance of the City of Detroit establishes a prohibition to an additional business defined as a "regulated use" by the ordinance where there are two existing regulated uses within 1,000 feet of the proposed use defined as a regulated use. Pursuant to Section 66.0101, this prohibition may be waived by the City Plan Commission if the following findings are made by that administrative body: (App G, p 68)

> "a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.
>
> b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.

d) That all applicable regulations of this Ordinance will be observed."

However, Section 66.0103 states that the City Plan Commission shall not consider such a waiver of locational requirements specified in Section 66.0000 until a petition has been filed with that administrative body which has been signed—and which signatures have been verified by a separate and additional administrative procedure through the Department of Building and Safety Engineering of the City of Detroit and the Detroit Police Department—by 51% of those persons owning, residing or doing business within 500 feet of the proposed location. (Section 66.0103 of Ordinance No. 742-G, as amended by Ordinance No. 891-G; App11, pp 87-88)

The Nortown Theatre, subsequent to the enactment of the ordinances in question, "qualified" as a "regulated use", as defined in the ordinances, by allegedly changing the nature of the motion picture films exhibited on the premises, which premises had been built and continually used as a motion picture theatre for approximately 30 years. Since the Nortown Theatre was within 1,000 feet of several other "regulated uses" and within 500 feet of a residential area (Petitioner's Brief, p 5), all of the regulatory provisions of Ordinance 742-G were required to be met by respondent. Since respondent was deemed an "adult" theatre, if it met the requisites of 742-G, respondent was then required to obtain a license, pursuant to Ordinance 743-G, from the mayor of the City of Detroit. Section 5-2-3 specifies the standards to be applied by the chief executive officer of the city: (App H, p 82)

> "The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already issued upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this city regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby."

Thus, prior to exhibiting films defined by the ordinances as "adult" and in order to conform to the requirements of the ordinances in question without subjecting itself or its employees to criminal or civil sanction, the respondent was required to:

1. Obtain a petition from the Department of Building and Safety Engineering of the City of Detroit.

2. Obtain the signatures of 51% of those persons owning, residing, or doing business within 500 feet of the location of the Nortown Theatre.

3. Have the signatures thereon validated by the appropriate administrative agency of the city.

4. Present the petition and, as a nonconforming use, request a waiver from the City Plan Commission in accordance with Section 66.0101.

5. The findings having been made in accordance with sub-sections (a) through (d) of Section 66.0101, and if a

waiver is obtained from the City Plan Commission, obtain an "adult theatre license" from the mayor of the city.

6. If a waiver is not granted by the City Plan Commission, appeal that determination to the Board of Zoning Appeals whereat the applicant has the burden of overturning the findings and ruling of the City Plan Commission.

7. If the applicant is not successful before the Board of Zoning Appeals, the applicant may submit the matter to judicial review by filing an action for Writ of Superintending Control in the Circuit Court for Wayne County, Michigan, the court of general jurisdiction in the state. Michigan Constitution (1963), Art. VI, §28.

This procedure as outlined above, constitutes a prior restraint upon the exercise of respondent's rights under the First and Fourteenth Amendments of the Constitution of the United States in that the procedure established by the ordinances in question fail to meet even the most minimal requirements of procedural due process, for at each step the burden is borne by the proposed bookstore or theatre; at no point is a time limitation established within which the administrative procedure is to take place; the standards to be applied by the administrative agencies are so fraught with vagueness as to be virtually non-existent; and judicial review is neither prompt, nor assured and indeed, may be deemed to be rendered inoperative.

Though prior restraints are not unconstitutional *per se* *Southeastern Promotions, Ltd. v Conrad, supra; Bantam Books, Inc. v Sullivan,* 372 US 58, at p 70, Note #10 (1963), as this court said in *Southeastern Promotions, Ltd. v Conrad, supra,* at pp 558-60:

> "Any system of prior restraint, however 'comes to this Court bearing a heavy presumption against its constitutional validity.' . . . The presumption against prior restraint is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable . . . .
>
> In order to be held lawful, respondents' action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and second, it must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech . . . .
>
> The settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' Freedman v Maryland, 380 US 51, 58 . . . In Freedman, the Court struck down a scheme for the licensing of motion pictures, holding 'that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.' 380 US, at 58, 13 L Ed 2d 649. We held in Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards. *First,* the burden of instituting judicial

proceeding, and of proving that the material is unprotected, must rest on the censor. *Second,* any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third,* a prompt final judicial determination must be assured."

Thus, any system of prior restraint which does not establish, by its terms, the criteria enunciated in *Southeastern Promotions, Ltd., supra* and *Freedman v Maryland,* 380 US 51 (1965), fails to meet the requirements of the Procedural Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and is void. Clearly, these criteria are applicable, for though the thrust of the ordinances is addressed to regulating bookstores or motion picture theatres exhibiting materials of a specific nature rather than the materials *per se,* it is of no legal consequence that the censor did its work by placing a burden upon the establishment of such a business selling or exhibiting those materials through the use of the city's zoning and/or licensing authority rather than censoring the materials themselves, for the effect is the same; by denying a person the right to establish and operate a book store or a motion picture theatre or the right to an existing theatre or bookstore to exhibit "adult" press materials through the use of the city's zoning and licensing powers the ordinances effectively place an undue and restrictive burden upon the exercise of First Amendment rights. Thus, the assertion by the City of Detroit of its authority under its zoning and licensing powers to prohibit and/or regulate the establishment and/or operation of businesses selling or exhibiting materials of a particular nature and of a specific sexual content and thereby to prohibit and/or regulate the right to exhibit or disseminate materials presumptively protected under the First Amendment is the essence of this censorship scheme.

Petitioners' answer that the requisites of procedural use process enunciated in *Freedman, supra* and reiterated in *Southeastern Promotions, Ltd., supra,* are not applicable to the ordinances in question on the theory that it is the proposed theatre or bookstore, not the press materials *per se,* which are regulated is logically untenable and constitutionally irrelevant, for, as the court said in *Southeastern Promotions, Ltd. v Conrad, supra:*

> "Respondents' action here is indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions . . . In these cases, the plaintiffs asked the courts to provide relief where public officials had forbidden the plaintiffs the use of public places to say what they wanted to say. The restraints took a variety of forms, with officials exercising control over different kinds of public places under the authority of particular statutes. All, however, had this in common: *they gave public officials the power to deny use of a forum in advance of actual expression.*" (Emphasis added.)

The court then went on:

> "The elements of prior restraint identified in Cantwell and other cases were clearly present in the system by which the Chattanooga Board regulated the use of its theater. One seeking to use a theater was required to apply to the Board. The Board was empowered to determine whether the applicant should be granted permission—in effect, a license

> or permit—on the basis of its review of the content of the proposed production. Approval of the application depended upon the Board's affirmative action. Approval was not a matter of routine; instead, it involved the 'appraisal of facts, the exercise of judgment, and the formation of an opinion' by the Board."

Most, if not all, of the same elements of prior restraint identified by the court in *Southeastern Promotions, Ltd., supra,* exist in the system created by the City of Detroit to regulate the establishment and use of theatres and bookstores in the city by means of the ordinances in question, for, "One seeking to use a theatre . . . [to exhibit 'adult' films] . . . was required to apply to the . . . [City Plan Commission] . . . the . . . [City Plan Commission] . . . was empowered to determine whether the applicant should be granted permission—in effect a license or permit—on the basis of its review of the content of the . . . [press materials proposed to be exhibited on the premises] . . . approval of the applicant depended upon the . . . [City Plan Commission's] . . . affirmative action. Approval was not a matter of routine; instead, it involved the 'appraisal' of facts, the exercise of judgment, and the formation of an opinion by the . . . [City Plan Commission] . . . " Nor is the thrust of the regulatory ordinances at issue grounded upon an established exception to the doctrine of prior restraint. *Southeastern Promotions, Ltd. v Conrad, supra,* at pp 555-56.

The burden of going forward is placed upon the applicant at every step of the administrative procedure; *Lafayette Market and Sales Company v City of Detroit,* 43 Mich App 129 (1971). After exhaustion of the Administrative procedure, an aggrieved party may seek review in the

Circuit Court under General Court Rule (1963) 711 by filing a complaint for Writ of Superintending Control in order to implement the superintending or supervisory control power of the court over inferior tribunals. However, the reviewing court is limited to a determination as to whether a decision by an administrative agency is supported by competent material and substantial evidence.

Michigan Constitution (1963), Art. VI § 28

"Administrative action, review

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licences, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . . "

Thus, on appeal, review is limited to the question of whether or not the administrative board acted arbitrarily or abused its discretion. *Indian Village Manor Co. v Detroit,* 5 Mich App 679 (1967).

In *Mazo v City of Detroit,* 9 Mich App 354 (1968), the Court of Appeals held that a finding by the Common Council of the City of Detroit—acting as a zoning board of appeals—was "supported by competent, material and substantial evidence on the whole record." Absent a finding of an abuse of discretion the court was prevented from overriding the decision of the Common Council. What was

at issue in this matter, was *inter alia,* the application of the same "regulated use" ordinance which is now before the Court, and specifically the regulation prohibiting the establishment of more than two businesses defined as "regulated uses" within 1,000 feet of another. The court said at pp 364-365:

> "Section 10-1D is a 'skid row' ordinance whose object is to prevent neighborhood deterioration and whose validity no one contests. Mr. Elmer Mueller, head city planner, testified that it was the city's object to minimize the problems created by the congestion of liquor bars in a neighborhood. The city may legitimately use its ordinance to improve the condition of a neighborhood by refusing to authorize new nonconforming uses. Austin v Adler (1938), 283 Mich 667. This decision lay within the discretion of the common council.
>
> For plaintiff to have obtained a valid approval it was essential by the terms of the ordinance, section 10-1D quoted *supra,* that she obtain a waiver from the common council.
>
> We cannot agree with the trial court that the common council abused its discretion. The council is vested with authority to grant waiver after recommendation by the city plan commission and upon making a specified finding. In voting to deny plaintiff's petition, the council followed the recommendation of the city plan commission and found that the conditions that would justify waiver were not satisfied. The plan commission's finding was made after a graphic presentation by its staff, after plaintiff's counsel argued her case, and after testimony was taken in favor of and in opposition to plaintiff's

> proposed establishment of a bar. That a majority of those in the neighborhood surveyed in April, 1966 by the Detroit police department approved of the bar's establishment was not conclusive; that majority could not bind the plan commission or the city council. The findings were 'supported by competent, material and substantial evidence on the whole record.' Const 1963, art 6, § 28. The constitutional requirement was satisfied.
>
> The trial judge inspected the premises and the surrounding area, and he formed the opinion that the conditions that would support a waiver under the ordinance were satisfied in this case. However, absent a proper finding of an abuse of discretion, the trial court cannot override the decision of the common council. . . .'
>
> Therefore, though an applicant may seek judicial review of an adverse finding, the scope of review is limited to a finding that the administrative agency made a decision upon competent material and substantial evidence and unless the court finds that the administrative agency abused its discretion its ruling must stand. Thus, the burden imposed upon an applicant, once judicial review is instituted, is qualitatively greater and of a different nature than a burden usually imposed upon a litigant. The effect of the application of Michigan law in the case at bar and in the context of the regulatory ordinances at issue is to effectively deny judicial review of any meaning and of any substance.

Speiser v Randall, 357 US 513, (1958) at pp 520-529:

> "When we deal with the complex of strands in the web of freedoms which make up free speech, the

operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

. . . The procedures by which the facts of a case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights . . . the state . . . must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances . . . the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford.

. . .

The principal feature of the California procedure . . . is that the appellants as taxpayers under state law, have the affirmative burden of proof . . . the question for decision therefore, is whether this allocation of the burden of proof on an issue concerning freedom of speech, falls short of the requirements of due process.

. . .

Where the transcedent value of speech is involved, due process certainly requires in the circumstances

of this case that the state bear the burden of persuasion to show that appellants engaged in criminal speech. Kingsley Books, Inc. v Brown, 354 US 436, 1 L Ed 2d 1469. The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear those burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position. . . . We hold that when the constitutional right to speak is sought to be deterred by a state . . . due process demands that the speech be unencumbered until the state comes forward with sufficient proof to justify its inhibition."

This constitutional defect is compounded by the fact that the guidelines to be applied by the administrative agency are vague and ambiguous.

If we start with the premise that precision of regulation must be the touchstone, *Interstate Circuit v Dallas, supra,* at p 682, these guidelines fail to meet even the most minimal requirements necessary to avoid the vice of vagueness. As this court said in *Interstate Circuit v Dallas, supra,* at pp 684-685:

> " . . . '[i]t does not follow that the Constituion requires absolute freedom to exhibit every motion picture of every kind at all times and all places'

> What does follow at the least . . . , is that the restrictions imposed cannot be so vague as to set 'the censor . . . adrift upon a boundless sea . . . , ' In short, as Justice Frankfurter said, 'legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion . . . , ' Kingsley Int'l Pictures Corp. v Regents, 360 US, at 694, 3 L Ed 2d at 1520 (concurring in result), one reason being that 'where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative [by vagueness].' Joseph Burstyn, Inc. v. Wilson, supra, at 532, 96 L Ed at 1121 (concurring opinion)."

The words of Justice Frankfurter, concurring in *Joseph Burstyn, Inc. v Wilson,* 343 US 495 (1951) at p 532, are particularly relevant and applicable to the case at bar:

> " . . . Prohibition through words that fail to convey what it permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways. First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. On the basis of such a portmanteau word as 'sacrilegious,' the judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in large measure, subjective determinations. Thus, the administrative first step becomes the last step."

If the applicant is able to sustain his burden of proof, Section 66.0101 specifies that the City Plan Commission may waive the locational prohibition. (App G, p 68) Section 31.0000(b) of the Official Zoning Ordinance of the City of Detroit (Ordinance No. 390-G) defines this term as follows:

> "The word 'shall' is always mandatory and not discretionary. The word 'may' is permissive."

Thus, even if the applicant is able to meet the burden of proof before the City Plan Commission, that administrative board is nevertheless empowered with the discretion to grant or deny a waiver of the locational provisions.

There is nothing in the ordinances which specify a time limitation within which to determine whether the applicant has qualified under Section 66.0103, nor is there a time limitation to which the City Plan Commission must conform under Section 66.0101. No statutory procedure exists which will insure a prompt judicial decision of a denial of a license nor is there a statutory procedure which would insure a prompt administrative decision from the Department of Building and Safety Engineering or the City Plan Commission. (It should be noted that in *Mazo v City of Detroit, supra,* the only reported case in Michigan pertaining to the "regulated use" ordinance, a petition for waiver was filed on October 19, 1966 and, after a decision from the City Plan Commission and hearing before the City Council, the petition was denied on January 24, 1967. The Circuit Court granted the property owner relief and the City of Detroit appealed. The Court of Appeals reversed on February 26, 1968. The administrative procedure thus took over three months and the judicial proceedings approximately one year. It should also be noted that the Court of

Appeals held, even though a survey of the neighborhood was conducted—a procedure identical to the one required by Section 66.0103 of Ordinance #742-G and even though a majority of those in the neighborhood approved of the proposed use—the City Plan Commission and the City Council was not bound by that approval, at p 364. Thus, the petition requirement—though not binding—is an additional requisite wherein the applicant for the proposed use must, of necessity, spend additional time meeting same.)

This particular system of restraint is enforced by threat of both criminal and civil sanction.

Section 69.0000 of the official Zoning Ordinance of the City of Detroit specifies that a violation of same shall subject the violator, upon conviction to a fine of not more than $500.00 or to imprisonment for no more than 90 days and further specifies that each day that a violation continues shall constitute a separate offense. MCLA §125.587 permits a court, upon a finding that a use is nonconforming in that it is violative of a municipal zoning ordinance, to be deemed a nuisance *per se* and subject to immediate abatement.

The delay and uncertainty inherent in the procedural process created by the ordinances in question would have the effect of discouraging a theatre or bookstore operator from offering for sale or exhibiton press materials of an alleged "adult" nature on the premises. The City of Detroit, " . . . [can] . . . not escape the obligation to afford appropirate procedural safeguards." The provisions of ordinances do not "assure prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances," *Southeastern Promotions, Ltd. v Conrad, supra,* and as such, the system of prior restraint at bar, having failed to meet the minimal appropriate and

necessary procedural safeguards consistent with First Amendment rights, is an unconstitutional prior restraint upon respondent's rights under the First and Fourteenth Amendments to the Constitution of the United States.

III.

ORDINANCE NOS. 742-G AND 743-G OF THE ORDINANCES OF THE CITY OF DETROIT, AS SAME PURPORT TO REGULATE THE ESTABLISHMENT OF "ADULT" BUSINESSES IN THE CITY OF DETROIT, ARE VIOLATIVE OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, AS WRITTEN AND/OR AS APPLIED, IN THAT, BY THEIR TERMS, THE STATUTORY CLASSIFICATION IS GROUNDED UPON THE CONTENT OF THE MATERIALS AND FURTHER, SAID STATUTORY CLASSIFICATION IS NOT RATIONALLY RELATED TO A VALID PUBLIC PURPOSE NOR NECESSARY TO THE ACHIEVEMENT OF A COMPELLING STATE INTEREST.

The ordinances in question are zoning ordinances. However, assuming an area of the city is zoned for general business purposes, these ordinances place a selective burden upon certain kinds of businesses ostensibly because as Section 66.0000 of Ordinance No. 742-G states, certain businesses have "serious objectionable operational characteristics," and thereby have a "deleterious effect upon adjacent areas", which contribute to the blighting or downgrading, "of the surrounding neighborhood." These businesses are classified as "regulated uses" and more than two such uses within 1,000 feet of one another are prohibited. Those uses include "adult" bookstores and motion picture theatres—as defined in said ordinance—Class "D" cabarets, hotels, motels, bars, shoeshine parlors, etc. Thus, it follows that

if a bar is down the block; if a motel is across the street; if a barbershop has a shoeshine parlor, then the proposed establishment of a bookstore or a motion picture theatre intending to sell or exhibit "adult" materials is prohibited from opening without first meeting the requirements of Section 66.0101 and pursuant thereto, obtaining a waiver of the locational restriction from the City Plan Commission.

Having classified certain kinds of book stores and motion picture theatres as "regulated uses," Ordinance No. 742-G places an additional burden upon the establishment of adult bookstores, adult motion picture theatres, adult mini motion picture theatres and Class "D" cabarets. Section 66.0103 requires the submission of a petition signed by 51% of those person sowning, residing or doing business within 500 feet of the proposed location before the poribition against the establishment of an adult bookstore, adult motion picture theatre, adult mini motion picture theatre or Group "D" cabaret within 1,000 feet of another, "regulated use" may be waived by the City Plan Commission. Thus, having classified so called "adult" businesses as "regulated uses" and prohibited more than two within 1,000 feet of another without the approval of the City Plan Commission, Section 66.0103 of Ordinance No. 742-G, in effect, creates a sub-category within a category, for of those classified as regulated uses, only adult bookstores, adult motion picture theatres, adult mini motion picture theatres and Class "D" cabarets need obtain the consent of 51% of those persons owning, residing or doing business within 500 feet of the proposed location.

Generally, the United States Supreme Court has recognized that a state has the power to treat different classes of persons in differnt ways, however, the Equal Protection

Clause of the Fourteenth Amendment denies the states the power to classify arbitrarily but must be reasonable and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

Eisenstadt v Baird, 405 US 438 (1972)
Reed v Reed, 404 US 71 (1971)

In *Dunn v Blumenstein*, 405 US 330 (1972), the United States Supreme Court struck down Tennessee's durational voting residency requirements as violative of the Equal Protection Clause of the Fourteenth Amendment. In so doing, the court restated the classic formulation of the test to be applied where an ordinance or statute is attacked as repugnant to the Equal Protection Clause:

> "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. Cf. Williams v Rhodes, 398 US 23, 30, 21 L Ed 2d 24, 31, 89 S Ct 5 (1968). In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interest involved. First, then we must determine what standard of review is appropriate.
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> . . .
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> . . . durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.' Shapiro v Thompson, supra, at 634, 22 L Ed 2d at 615 (first emphasis added):

Kramer v Union Free School District, 395 US at 627, 23 L Ed 2d at 589. Thus phrased, the constitutional question may sound like a matehematical formula. But legal 'tests' do not have the precision of mathematical formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes.

It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or resrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision', NAACP v Button, 371 US 415, 538, 9 L Ed 2d 405, 421, 83 S Ct 328 (1963); United States v Robel, 389 US 258, 265, 19 L Ed 2d 508, 514, 88 S Ct 419 (1967), and must be 'tailored' to serve their legitimate objectives. Shapiro v Thompson, supra, at 631, 22 L Ed 2d at 613, And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"

And in *Eisenstadt v Baird, supra,* at Note #7:

> " . . . Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under Griswold, the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest. . . .

Taking the formulation enunciated in *Dunn v Blumenstein, supra,* the nature of the classification and the interests so affected relate directly to the exercise of First Amendment rights, for the single distinction between those businesses which fall within the regulatory purview of Ordinance No. 742-G and those which do not—and indeed, those businesses which must meet the additional burden imposed by Section 66.0103 as well as the burden imposed by Section 66.0000—is the content of the press materials intended to be sold or exhibited on the premises of the proposed business. By placing such a burden upon the establishment of a bookstore or motion picture theatre, said ordinances directly affect those who wish to operate such a business and further, effectively regulate the public's access to presumptively protected press materials.

Petitioners would argue that a bookstore or a movie theatre is a business like any other business establishment and should therefore be treated no differently than any other retail establishment. However, the ordinances at issue discriminate among bookstores and theatres solely on the basis of the content of the books, periodicals and films intended to be sold or exhibited on the premises. Furthermore, it would be specious to argue that a book or motion picture film is protected expression under the First and Fourteenth Amendments to the Constitution of the United States but the place where books are sold or films are exhibited is not protected. The censor would have little difficulty in restricting the public's access to newspapers by taxing the printing press upon which the newspaper was printed if the First Amendment was given such a narrow scope. *Near v Minnesota, supra.* Indeed, the court has recognized that the setting of a bookstore or commercial theatre falls within the umbrella of First Amendment protec-

tions. *Roaden v Kentucky,* 413 US 496 (1973) at p 504, for a bookstore or a theatre bears a necessary relationship to the freedom to distribute information or opinion, *Schneider v State,* 308 U.S. 149 (1939) at p 161; books cannot be sold without a store established for that purpose and films cannot be shown without a building within which to exhibit them. *Grayned v City of Rockford, supra,* at p 235, Note #47; *Cameron v Johnson,* 390 US 611 (1968), at 617.

Thus, since the ordinances affect a fundamental right, they are unconstituional unless the state can demonstrate that these ordinances are necessary to promote a compelling governmental interest, and further, that the regulatory scheme chosen is the least drastic among reasonable ways to achieve its objectives. *Dunn v Blumenstein, supra; Shelton v Tucker,* 364 US 478; *Village of Belle Terre v Boraas,* 416 US 1, (1974), Justice Marshall, dissenting opinion, at p 18.

Petitioners maintain that businesses intending to offer press materials for sale, display and/or exhibition may be prohibited from certain areas of the City of Detroit (which prohibition may be waived) even though the press materials intended to be sold or exhibited are not obscene and therefore, fully entitled to the protection of the First Amendment, and justify this contention on the grounds that the City of Detroit has a valid interest in protecting and preserving the residential areas of the city and the business districts which serve them. Petitioners' Brief, at pp 15 and 29, states the rationale for the regulations in question:

> "The city is attempting . . .to regulate the location of those businesses which, when clustered together or located immediately adjacent to residential

> areas, are not conducive to the stability of the neighborhood, but rather create an atmosphere which drives away potential residents and merchants, adversely affects the living conditions in the neighborhood, forces a decline in property values and a resulting exodus of the residents and businessmen, and contributes to the general deterioration of the business districts and the surrounding residential neighborhoods which they serve.
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> The need to provide a suitable atmosphere for family living and a suitable atmosphere to raise children, to avoid blight and decay of neighborhoods, to conserve property values, and to attract rather than dispel concerned citizens willing to maintain their neighborhoods, is compelling justification, for the regulations imposed by the City of Detroit."

These regulatory ordinances were originally adopted in 1962 when certain businesses, liquor establishments, hotels, motels, and pool halls among others, were classified as "regulated uses" upon a finding that the "skid row" atmosphere which existed in parts of Detroit was created in large part by a concentration of similar types of businesses which were not oriented to serve the needs of the immediate neighborhood but primarily attracted persons from without the surrounding community who add little or no concern for the maintenance of a viable neighborhood. To prevent the establishment of a skid row in other areas of the city creating a similar situation resulting in blight and police problems, the regulated use ordinance, prohibiting the establishment of more than two "regulated uses" within 1,000 feet of another, was enacted. In doing so, substantial reliance was placed upon testimony of Dr.

Mel Ravitz, a sociologist and former president of the Common Council of the City of Detroit, who pointed out the concept of the self-fulfilling prophecy and its importance to the stability of a residential neighborhood:

> " . . . if people believe something is true, evn if it is not originally, they will tend to act as if it were true, and in so doing, help produce the condition that originally was only believed; that if residents of any neighborhood believe that the concentration of the proscribed uses damage the neighborhood, they will act as if it were true, and will seek to move away and allow people with different standards to move in. They will allow their property to decline, and will not engage in the full range of activities necessary to the maintenance of a healthful residential neighborhood." (Petitioners' Brief, p 19).

Approximately ten years later "adult" businesses were added to the list of "regulated uses" in order to

> " . . . avoid a resurgence of the skid row . . . to protect the property values of the surrounding businesses and residences, and to maintain confidence in and stability of the neighborhoods." (Petitioners' Brief, pp 19-20).

The interest asserted by Petitioners to justify the ordinances at issue, appears to be the right of privacy of adjoining home owners and businessmen in the sense that an "adult" business is an intrusion upon the rights of those families and businesses allegedly because it contributes to the deterioration of a neighborhood. (Petitioners' brief, pp 35-36). In pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling

viewers or auditors, the Court said just last term, in *Erznoznik v City of Jacksonville, supra,* at pp 208-211:

> "Such cases demand delicate balancing because
>
> > '[i]n th[e] sphere of collision between claims of privacy and those of [free speech or] free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society.' Cox Broadcasting Corp. v Cohn, 420 US 469, 491, 43 L Ed 2d 328, 95 S Ct 1025 (1975).
>
> Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. . . . But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. . . . Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see Rowan v Post Office Dept., 397 US 728, 25 L Ed 2d 736, 90 S Ct 1484 (1970), or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See Lehman v City of Shaker Heights, supra. As Mr. Justice Harlan cautioned:
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> > 'The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable man-

ner. Any broader view of this authority would effectively employ a majority to silence dissidents simply as a matter of personal predilections.' Cohen v California, 403 US, at 21, 29 L Ed 2d 284, 91 S Ct 1780.

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' Rowan v Post Office Dept., 397 US, at 736, 25 L Ed 2d 736, 90 S Ct 1484. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances decribed above, the burden normally falls upon the viewer to 'avoid further bombardment of [his] eyes.' Cohen v California, 403 US, at 21, 29 L Ed 2d 284, 91 S Ct 1780."

However, the alleged intrusive behavior is not the speech itself, for the regulatory thrust of the ordinances is triggered by the content of the expression *intended* to be sold or exhibited, not what is sold or exhibited. Thus, there is no unwilling auditor or viewer and by definition, no captive audience. Therefore,

> "We are not concerned in this case with a properly drawn zoning ordinance restricting the location of . . . theatres or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from the visual and audible intrusions of such theatres." *Erznoznik v City of Jacksonville, supra,* Note #9.

The homeowner's right of privacy is not invaded in any manner. To the contrary, the "intrusion" in the case at bar is grounded upon what those within the neighborhood *believe* will be the alleged detriment to the neighborhood, for it is those people within a specified area of the proposed use which must grant their approval and it is an administrative agency which, in acting on behalf of the residents and residential area involved, must then make a finding that the proposed use will not be a detriment to the surrounding neighborhood. These ordinances thus grant authority which would, " . . . effectively employ a majority to silence dissidents simply as a matter of personal predilections." *Cohen v California,* 403 US, at p 21. However, a community may not, consistent with the First Amendment, wall itself off from speech which, directly or indirectly, is presumed to be offensive to that community. See *Organization for a Better Austin v Keefe,* 402 US 15 (1971) at pp 418-420.

Petitioners also assert that the ordinances in question are justified on the basis of the City of Detroit's undoubted interest in protecting minors. However, this interest is asserted in the context of the purpose and intent of all zoning oridnances " . . . of providing a suitable atmosphere for family living, and a suitable atmosphere to raise children." Again, as was said in *Erznoznik v City of Jacksonville, supra,* at pp 212-214:

> " . . . a . . . municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults . . . nevertheless minors are entitled to a significant measure

> of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.
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> . . . Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."

Raising children in a suitable atmosphere, though undoubtedly a salutory purpose, could in no way justify restricting access of the general public to press materials protected under the First Amendment. As this court said in *Butler v Michigan,* 352 US 380 (1957):

> "The state insists that by . . . quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig.
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> • • •
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> We have before us legislation not reasonably to restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.

What is left, then, is the rationale for the regulatory ordinances found at pp 22-23 of Petitioners' Brief:

> "Even though there is now no question that pornography may be banned, there remains the very real problem of controlling the influx of adult businesses whose stock in trade, whether films, magazines or performances, are entitled to display and/or distribution before any judgment may be made as to whether the material offered is pornographic. In addition, unless and until the courts rule that the use of an establishment to exhibit or sell obscene press materials or films is abateable as a nuisance, continued and repeated convictions for disseminating pornographic material will not close those business establishments which are the continuing, visible sources of material which is offensive to the neighborhood business and residential community whether or not the material has been legally determined to be pornagraphic. Experience has shown that one or more convictions against an establishment does not force its closure, nor does it offer any protection to the neighborhood.

At the hearing on motions for summary judgment on September 17, 1973, before District Court Judges Cornelia G. Kennedy and Lawrence Gubow, defense counsel stated, in response to various questions from the court: (App. L., pp 47-50)

> *"Mrs. Reilly:*
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> " . . . What we have tried to do in enacting these new regulations is to avoid an adverse affect [sic] on our neighborhoods, an adverse affect [sic] we see time and time again recurring. We know now that the Court has said that any material which is proven to be obscene may be entirely prohibited;

and yet we must be realistic and face facts. It is only after such movies as 'Deep Throat' are actually found to be obscene that they may be prohibited. Until that time, when there is a Trial on the merits and a decision, a final decision, that material may be disseminated at random and at the will of the person who is operating the theatre or the book store. . . . The fact is that if we do not in some way control the dissemination of what we describe as adult material, it can and it has adversely affected our neighborhoods. And the City must take some kind of action. It cannot sit back and wait until this material is finally determined to be obscene or not."

• • •

• • • we know that until these kinds of magazines are taken to Court one by one on a piecemeal basis, there is no way that we can stop the sale or dissemination of this kind of material.

Judge Gubow:

Doesn't that lend credence to the argument that you are here atempting to do indirectly what you cannot do directly through the obscenity statute?

Mrs. Reilly:

. . . It is true we cannot do indirectly what we want to do directly if we are not in compliance with the law. But what the Court said, the U.S. Supreme Court, in the Miller and Paris Adult Theatre case, is that when we are dealing with commercialization in sex, it is a whole new ballgame. And if the City is faced with the actual fact that these kind of bus-

inesses are offering what is truly described as adult material and that adult material is being sold from a business in a commercial enterprise in such a way that it affects the neighborhoods, taking those books piece by piece to court under the obscenity laws is not going to close down the business. . . . if 'Deep Throat' is cited under a criminal statute and is found to be in violation of the obscenity laws, the owner of the store may be fined or he may be sentenced to jail for a few months; but that does not stop the operation of the business . . .

Judge Kennedy:

What you are saying is that the criminal laws don't preserve the neighborhood.

Mrs. Reillys

That's right your Honor. Thank you. She said it in a nutshell."

Thus, since a bookstore or theatre, once established, cannot be removed from the neighborhood, notwithstanding that its stock in trade is "adult" material, the city is seeking to prevent the establishment of such bookstores and theatres by means of these ordinances. In the name of "preservation of the neighborhood" the ordinances in question are intended to prevent the establishment and operation of business establishments, ". . . which are the continuing visible sources of material which is offensive to the neighboring business and residential community . . ."

The effect of the ordinances is to prevent the establishment of new bookstores and theatres selling or exhibiting materials which are presumptively protected by the First

Amendment and to deter existing theatres and bookstores from offering for sale or exhibition press materials which have never been found to be obscene by a prior judicial adversary hearing on that issue, *Marcus v Search Warrant,* 367 US 717 (1961); *A Quantity of Books v Kansas,* 378 US 205 (1964), and therefore are entitled to the full protections of the First Amendment. The City of Detroit is in effect, using the sledgehammer in an area which this court has said requires the most sensitive of tools. *Speiser v Randall,* 357 US 513 (1958). The ordinances operate to suppress, on the basis of past experience, i.e., established bookstores and theatres of an assumed "similar" nature, the distribution of press materials presumptively protected by the First Amendment and is thus a classic example of a prior restraint. *Near v Minnesota,* 283 US 697 (1931); *Organization for a Better Austin v Keefe, supra.*

The rationale of the Petitioners is plainly untenable for at most it amounts to no more than the argument rejected by the Court in *Police Dept. of the City of Chicago v Mosely, supra,* that a certain kind of picketing—that which was prohibited—was more prone to produce violence than another kind of picketing:

> "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. '[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.'

> Tinker v Des Moines School District, 393 US, at 508, 21 L Ed 2d at 739 . . ."

Contrary to Petitioners' assertion, it is of no legal consequence that respondent operates a commercial enterprise.

> *Smith v California, supra,* at 150:
>
> "It is . . . no matter that the dissemination [of books] takes place under commercial auspices . . . Certainly a retail book seller plays a most significant role in the process of the distribution of books."
>
> *Ginzburg v United States,* 383 US 463 (1966) at p 474,
>
> "No weight is ascribed to the fact that petitioners have profited from the sale of publications . . . to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."

And see *New York Times Co* v *Sullivan,* 376 US 254 (1964), at p 266.

Nor is it constitutionally relevant that respondent may operate a theatre in another area of the City of Detroit. In *Southeastern Promotions Ltd v Conrad, supra,* at p 556, the court said:

> "Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence. There is reason to doubt on this record whether any other facility would have served as well as these, since none apparently had the seating capacity, accoustical features, stage

> equipment and electrical service that the show required. Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v State, supra, 308 US, at 163 84 L Ed 155."

Finally, Petitioners' rationale that the ordinances operate to merely regulate the establishment of bookstores and theatres of the nature defined by the ordinances not suppress them, is of no legal consequence in the context of First Amendment rights. *Southeastern Promotions Ltd v Conrad, supra,* Note # 8:

> "Also important, though unessential to our conclusion, are the classificatory aspects of the Board's decision. A licensing system need not affect total suppression in order to create a prior restraint. In Interstate Circuit v Dallas, 390 US 676, 688, 20 L Ed 2d 225, 88 S Ct 1298 (1968), it was observed that the evils attendant on prior restraint 'are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression.' In that case, the Court held that a prior restraint was created by a system whereby an administrative board in Texas classified films as 'suitable for young persons' or 'not suitable for young persons.' The 'not suitable' films were not suppressed, but exhibitors were required to have special licenses and advertise their classification in order to show them. Similarly, in Bantam Books, Inc. v Sullivan, 372 US 58, 9 L Ed 2d 584, 83 S Ct 631 (1963), the Court held that a system of 'informal censorship' working by exhortation and advice sufficiently inhibited expression to constitute a prior restraint and warrant injunctive relief. There, the Court held unconstitutional a system in which a commission was charged with reviewing material 'manifestly tending to the corruption of the youth'; it did not have direct regulatory or suppressing functions, but operated by persuasion and intimidation, and these informal methods were found effective.
>
> In the present case, the Board classified the musical as unfit for showing in municipal facilities. It did not make a point of publicizing its finding that 'Hair' was not in the 'best interest' of the public, but the classification stood as a warning to all concerned, private theater owners and general public alike. There is little in the record to indicate the extent to which the Board's action may have affected petitioner's ability to obtain a theater and attract an audience. The Board's classification, whatever the magnitude of its effect, was not unlike that in Interstate Circuit and Bantam Books."

The City of Detroit ". . . acting as a censor [has] . . . undertake[n] selectively to shield the public from some kinds of speech on the ground that they are more effesive than others . . . [in such a situation] the First Amendment strictly limits its power." *Erznoznik v City of Jacksonville, supra.* The city's basic premise, upon which these ordinances are grounded, would support restrictions upon virtually any kind of press materials of a controversial nature. such considerations cannot, under the First Amendment, justify the sweeping effect of these ordinances.

Each of the additional problems mentioned in Petitioners' Brief and supporting affidavits, i.e., increase in street crimes, prostitution and dope peddling, illegal parking, obscene materials in the possession of children, can be regulated by criminal statutes and ordinances already in force. Indeed these ordinances are designed to obviate the necessity of resorting to the criminal law. That the city's interest in preserving the neighborhoods from decay is made that much more difficult is but one more instance of the price we must pay for our freedoms. "The power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe on the protected freedoms." *Cantwell v Connecticut,* 310 US 296 (1941). "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v Tucker,* 364 US 479 (1960).

In the present case, the overly broad means employed by the ordinances at issue infringe upon and prohibit the exercise of First Amendment rights. Petitioners have presented no clear and convicing evidence of the existence of the alleged evils or that the ordinances are the most limited means available to reach such evil, and have thus failed to meet their burden of demonstrating the need for these broad remedies.

We are thus left with an ordinance which classifies those motion picture theatres and bookstores which fall within its regulatory purview and those which do not on the basis of the content of the press materials intended to be sold and/or exhibited. "The operative distinction is . . ." the image on the screen. "But above all else, the First Amendment means that government has no power to restrict ex-

pression, because of its message, its ideas, its subject matter or its content." *Police Dept. of Chicago v Mosley, supra,* at p. 95.

It cannot be logically argued that there is any qualitative difference between the message on a picket sign as in *Mosley, supra,* and the words in a book or the image on a screen, and if it is a violation of the Equal Protection Clause to prohibit all picketing within 150 fet of a school except where a labor dispute was involved, it is also a violation of the Equal Protection Clause to allow any book store or motion picture theatre on any street zoned for those uses but to prohibit more than two "regulated uses" within 1,000 feet of another and to require some regulated uses to met the additional burden of Section 66.0103, based upon the content of the materials intended to be sold or exhibited on the premises. This is the essence of the holding of the Sixth Circuit Court of Appeals (App A, pp 26-28) from which the Supreme Court of the United States granted certiorari. There is no reason to overrule that decision.

IV.

ORDINANCE NOS. 742-G AND 743-G, OF THE ORDINANCES OF THE CITY OF DETROIT, INSOFAR AS SAME PURPORT TO REGULATE THE ESTABLISHMENT OF MOTION PICTURE THEATRES IN THE CITY OF DETROIT, ARE REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT SAME, BY THEIR TERMS, PLACE A FORBIDDEN BURDEN UPON THE EXERCISE OF THE RIGHT OF FREE SPEECH IN THAT SAID ORDINANCES REGULATE THE EXPRESSION ABSENT ANY VALID AND/OR RECOGNIZABLE COMPELLING STATE INTEREST AND/OR IF THERE EXISTS A COMPELLING STATE INTEREST WHICH IS LEGITIMATE AND SUBSTANTIAL IN REGULATING MOTION PICTURE THEATRES IN THE CITY OF DETROIT, SAME ARE VOID FOR IMPERMISSIBLE OVERBREADTH BY EMPLOYING MEANS WHICH SWEEP UNNECESSARILY BROADLY AND THEREFORE INVADE THE AREA OF PROTECTED FREEDOMS.

It is axiomatic that any restraint or burden imposed upon a constiitutionality protected medium of expression comes into court bearing a heavy presumption *against* its constitutionality.

Freedman v State of Maryland, supra
Bantam Books, Inc. v Sullivan, supra

Subject to certain limited exceptions, any statute or ordinance which subjects communication or the mode thereof to governmental regulation infringes upon the right of free speech, imposes a prior restraint upon the enjoyment of First Amendment freedoms, and places a forbidden burden upon the exercise of liberty protected by the Federal Constitution.

N.A.A.C.P. v Button, 371 US 415 (1963)

"The decisions of this court have consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms."

Bates v Little Rock, 361 US 516 (1960)

"Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest interest which is compelling."

Thus, any interest—whatever its nature—which competes with freedom of speech must come equipped with clear and convincing evidence that its claims for supremacy are urgent, substantial, and relevant.

N.A.A.C.P. v. Alabama, 357 US 449 (1958)
Thomas v Collins, 323 US 516 (1944)
Talley v California, 362 US 60 (1960)
Lovell v Griffin, 303 US 444 (1937)

These constitutional requisites are no less applicable to municipal zoning ordinances where, under the guise of economic and social legislation, fundamental rights are impinged. Unlike the circumstance in *Village of Belle Terre* v *Boraas*, 416 US 1 (1974), the zoning ordinances in question were aimed directly at a fundamental constitutional right. Freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive and the right to read. *Griswold* v *Connecticut*, 381 US 479 (1965), at pp 482-483. The very purpose and intent of the zoning ordinances in question is to regulate the establishment of new "regulated uses", (a "regulated use" in the context of an "adult" bookstore or theatre is defined in terms of the substantive message of the books, periodicals or films intended to be sold or exhibited and

therefore applies to proposed bookstores and theatres in addition to existing bookstores and theatres wishing to sell or exhibit "adult" press materials). Allegedly because adult boodstores and theatres have "serious objectionable operational characteristics which have a "deleterious effect upon adjacent areas." If, "the state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold* v *Connecticut, supra,* it may not, by means of a zoning ordinance, restrict the right to distribute and the right to receive by restricting the means by which books, magazines or films are distributed to, and received by, the public, particularly where, as here, a theatre or bookstore bears a necessary relationship to that aspect of free speech and press. *Schneider v State, supra.*

Petitioners assert that the zoning ordinances are aimed at the conduct of the business, not the press materials which it intends to disseminate, and premise their argument on the test enunciated by this Court in *United States v O'Brien*, 391 US 367 (1968). However, the ordinances themselves emphasize the word "adult", and that is defined on the basis of the content of the materials intended to be disseminated on the premises. Indeed, as Petitioners have said, the ordinances are intended to regulate businesses, ". . . which are the continuing visible sources of material which is offensive to the neighboring business and residential community." (Petitioners' Brief p 23). Thus, these zoning regulations cannot be justified as a regulation of conduct where the "conduct" is the expression itself.

As Chief Justice Warren stated in *United States v O'Brien, supra,* at p 382, and as the Sixth Circuit Court of Appeals reiterated: (App A, p 24)

> "The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In Stromberg v California, 283 US 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." See also, NLRB v Fruit & Vegetable Packers Union, 377 US 58, 79 (1964) (concurring opinion)."

In *Cohen v California,* 403 US 15 (1971), this Court struck down appellant Cohen's conviction under a statute wherein he was charged and found guilty of "offensive conduct." The Court said at pp 18-19:

> "The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech.' cf. Stromberg v California, 283 US 359, 75 L Ed 1117, 51 S Ct 532, 73 ALR 1484 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. United

States v O'Brien, 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673 (1968).

• • •

Appellant's conviction, then, rests squarely upon his exercise of the 'freedom of speech' protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. . . ."

And see, *Near v Minnesota, supra.*

It is the " . . . Communication allegedly integral to the conduct . . . [which] . . . is itself thought to be harmful, for it is the *use* as defined in Section 32.0007, which is purportedly recognized as having serious objectionable operational characteristics; and the use is defined in terms of the content of the press materials disseminated. Since the ordinances, ". . . are aimed at . . . communication . . . [they] . . . cannot be sustained as a regulation of noncommunicative conduct." As the operational distinction between motion picture theatres and bookstores which fall within the regulatory purview of the ordinances and those which do not is the subtsantive message of the book or motion picture intended to be sold or exhibited on the premises, "The only conduct which the state sought to . . . [restrict] . . . is the fact of communication." The ordinances in question must therefore be justified as a regulation of expression *per se.*

The Supreme Court has established the power of the state to regulate or prohibit certain forms of expression merely upon a showing that such a form was employed. For example, the State may validly prohibit obscene ma-

terial. Yet, if this was the purpose or intent of the ordinances they must necessarily fail as being void for impermissible overbreadth, for the ordinances, by their terms, define the materials exhibited at "adult" establishments by the specific sexual conduct or the specific anatomical content depicted therein, and not in terms of that which is defined as obscene. *Miller v California, supra.*

Nor can it conceivably be argued that the content of the materials, as defined, would be inherently likely to provoke violent reaction. *Chaplinsky v New Hampshire,* 315 US 568 (1942).

Finally, the state has the power to prohibit intrustion into the privacy of another. Yet, because of the nature of a theatre, there logically could be no unwilling or unsuspecting viewers, nor, would the presumed presence of an unwilling individual justify curtailing all speech capable of giving offense. Finally, whereas the state may prohibit intrusions into the privacy of the home, the Supreme Court has often stressed that we are often captives outside the sanctuary of the home and subject to objectionable speech. *Erznoznik v City of Jacksonville, supra.*

In *Cohen v California, supra,* the United States Supreme Court, per Justice Harlan, spoke at some length on the interest of the state in the area of First Amendment rights where that which the state regulated was the content of the material *per se:*

> " . . . this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not,

for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. Roth v United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957). . . .

"This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive *epithets* which, when addressed to the ordinary citizens are, as a matter of common knowledge, inherently likely to provoke violent reaction. Chaplinsky v New Hampshire, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942). . . .

"Finally, in arguments before this Court much has been made of the claim that Cohen's distateful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwilling listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, e.g., Organization for a Better Austin v Keefe, — U.S. — , 29 L. Ed. 2d 1, 91 S. Ct. — (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., Rowan v Postmaster General, 397 U.S. 728, 25 L. Ed. 2d 636, 90 S. Ct. 1484 (1970), we

have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.' *Id.*, at 738, 25 L. Ed. 2d at 744. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."

The form of expression in the case at bar is not subject to regulation since it is conceded that the zoning ordinances extend far beyond the permissible restraints on obscenity. They can be justified, if at all, only as a valid regulation of the manner in which freedom of speech is exercised, not as a permissible restriction on the substantive message intended to be conveyed. *Cohen v California, supra,* at pp 19-24. However, the zoning ordinance itself describes that which is subject to regulation not in terms of time, place and manner, but in terms of subject matter. This points up the fact that the zoning ordinances reach far beyond time, place and manner to restrictions on expression. *Cox v Louisiana,* 379 US 536, 556 (1965), Note #14; *Police Dept. of the City of Chicago v Mosely, supra,* at p 99.

The operation and effect of the ordinance is clear; their purpose is to regulate a form of expression which is not constitutionally subject to regulation; they are related to and aimed at the restriction and suppression of free expression, the effect of which is the essence of censorship.

Assuming *arguendo* that a legitimate governmental interest does exist, the means adopted by these zoning regulations in pursuit of that end restrict the exercise of free speech and press in a manner far greater than is necessary to the furtherance of that interest. In *Police Dept. of the City of Chicago v Mosely, supra,* at 101, Note #8, this Court said:

> "In a variety of contexts we have said that 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton v Tucker, 364 US 479, 488, . . . This standard, of course, has been carefully applied when First Amendment interests are involved. E.g., Schneider v State, 308 US 147, 164. . . . "

Contrary to Petitioners' assertion, the effect of the zoning ordinances on free speech and press is not incidental but is immediate, direct and stifling.

The method by which the city has attempted to regulate "adult" businesses is a two step procedure. First, the applicant must obtain the approval of 51% of those persons owning, residing, or doing business within a radius of 500 feet of the proposed use by circulating a petition in that area. (Section 66.0103 of Ordinance No. 742-G, as amended by Ordinance No. 891-G; App I, pp 87-88.) Second, having obtained the requisite number of signatures and same having been verified, if more than two regulated uses are within 1,000 feet of the proposed use, a prohibition to an additional regulated use exists which may be waived by the City Plan Commission upon certain findings being made by that administrative body. (Section 66.0101 of Ordinance

No. 742-G; App G, p 68). These provisions would apply to a theatre or bookstore intending to sell or exhibit "adult" material which wishes to open in a certain area of the city. They would also apply to an existing theatre or bookstore which wishes to relocate down the street, or one desiring to expand next door. Indeed, as the use is defined in terms of the content of the press materials, they would apply to an existing theatre or bookstore which wishes to exhibit or sell press materials defined as "adult"—the factual circumstance now before the court regarding the Nortown Theatre.

The first prong of the procedure, that an applicant must seek and obtain the approval of a majority of persons owning, residing or doing business within a given area of the proposed location, is the very antithesis of the Free Speech and Press provisions of the Constitution, for it subjects the exercise of free speech to the will of the majority and has the effect of allowing discourse to be shut off simply as a matter of personal predilection. It would have the effect of permitting the majority to decide what will be heard and where, on the assumption that the content of the expression its disquieting or annoying. It would permit exactly that which the First Amendment was intended to prohibit for if the First Amendment has any meaning, it is that all ideas—whether they be unorthodox, controversial or even hateful to the prevailing climate of opinion—have the full protection of the guarantees of the First Amendment.

Cohen v California, supra, at pp 23-25
Organization for a Better Austin v Keefe, supra
Edwards v South Carolina, 372 US 229 (1963), at pp 237-238
Terminiello v Chicago, 337 US 1 (1948) at p 4.

The second prong of the procedure established by the regulatory ordinances subjects the applicant of a proposed or existing theatre or bookstore, to an administrative procedure wherein the applicant is required to bear the burden of establishing criteria which are inherently vague before he will be permitted to engage in conduct which is concededly protected by the First Amendment.

The theatre or bookstore operator is required to state his future intent. However, it would be virtually impossible for him to know in advance what books will be printed or what films will be produced and indeed, what kind of press materials will be made available to him. He is therefore faced with a Hobson's Choice. He either limits himself to the innocuous and non-controversial or, in order to give himself the widest possible latitude in offering press materials to the public, and rather than run the risk of finding himself in the position of running afoul of criminal or civil sanction, or both, he may feel compelled to comply with the ordinances in question. His choice is then to act as his own censor or to subject himself to regulations which are inherently vague and a procedure which is fraught with delay and uncertainty. The precarious position of the bookstore or theatre operator becomes even more evident when one considers the nature of the threat of criminal and/or civil sanction.

The official Zoning Ordinance of the City of Detroit specifies that a violation of same shall subject the violator, upon conviction to a fine of not more than $500.00 or to imprisonment for no more than 90 days and further specifies that each day that a violation continues shall constitute a separate offense.

Section 69.0000:

"Any person, firm, or corporation, or anyone acting in behalf of said person, firm, or corporation, violating any provisions of this Ordinance shall, upon conviction, be subject to a fine of not more than five hundred dollars for each offense or to imprisonment in the Detroit House of Correction for a period of not more than ninety (90) days or to both such fine and imprisonment in the discretion of the court. Each day that a violation is continued shall constitute a separate offense. In the case of firms or associations, the penalty may be imposed upon the partners or members thereof, and in the case of corporations, upon the officers thereof."

In addition, the applicable statutes of the State of Michigan permit a building, upon a finding that the use to which it is put is in violation of a municipal zoning ordinance, to be deemed a nuisance *per se* and to be abated forthwith.

M.C.L.A., §125.587:

Violation nuisance per se; abatement.

"Buildings erected, altered, razed or converted, or uses carried on in violation of any provision of local ordinances or regulations made under the authority of this act are hereby declared to be a nuisance per se. The court shall order such nuisance abated and the owner and/or agent in charge of such building or land shall be adjudged guilty of maintaining a nuisance per . . ."

The coercive impact of the threat of these sections is obvious: the single issue in either a criminal or civil proceeding (or both) is whether the bookstore or theatre is,

or is not, "adult." Since the only question is whether the use is "adult," strict or absolute criminal and/or civil responsibility is imposed by the operation of these sanctions, for the question is not whether the theatre or bookstore operator *knowingly* operated an adult bookstore or theatre but merely whether he did, in fact, operate an adult bookstore or theatre. In *Smith v California, supra,* this court struck down an obscenity ordinance which imposed strict criminal responsibility on the grounds that the elimination of the scienter requirement may tend to work a substantial restriction on free speech and press. The strict liability features, the court held, would tend seriously to have the effect of restricting the public's access to books which are not obscene, and said:

> " . . . By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

Having dispensed with any requirement of guilty knowledge, the effect of these zoning ordinances would certainly be no different than that envisioned by the court in *Smith v California, supra.* Indeed, the effect would be even more comprehensive and stifling than that envisioned in *Smith, supra,* for the issue is whether the press materials sold or exhibited at the bookstore or theatre is "adult", not whether it is obscene.

These zoning ordinances are applicable to, and have a substantial effect upon, not only the so-called "adult" bookstore or theatre—whatever that term may mean—but to virtually every existing bookstore, theatre and even the corner drug store. It is not difficult to imagine, as this Court said in *Interstate Circuit v Dallas, supra,* "the vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison", to the publishing or motion picture industry. In the name of conservation of business and residential property values, and preservation of neighborhood stability, see *Schneider v State,* 308 US 147 (1939), discourse would be shut off, debate would be stilled and the most basic and most fundamental of our rights would be irrevocably weakened.

V.

SECTION 5-2-1.2 OF THE CODE OF THE CITY OF DETROIT, AS SAME PERTAINS TO THE ISSUANCE OF A LICENSE TO OPERATE AN "ADULT" MOTION PICTURE THEATRE, IS REPUGNANT TO THE FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS WRITTEN AND/OR AS APPLIED IN THAT THE STANDARDS ENUMERATED THEREIN ARE VAGUE AND AMBIGUOUS AND THUS TOTALLY INCAPABLE OF OBJECTIVE MEASUREMENT, THERBY VESTING THE MAYOR OF THE CITY OF DETROIT WITH VIRTUALLY UNLIMITED DISCRETIONARY POWER TO GRANT OR REFUSE A LICENSE, AND EFFECTIVELY IMPOSES A PRIOR RESTRAINT UPON THE EXERCISE OF FIRST AMENDMENT RIGHTS.

Section 5-2-1.1 of the Code of the City of Detroit provides that it is unlawful to operate any business regulated by said ordinance without first obtaining a license. Section 5-2-3 gives the Mayor of the City of Detroit the authority to grant or refuse such a license. Section 5-2-3 reads:

> "The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already issued upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this city regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." (App H, p 82)

Because of the total lack of criteria and/or because of the vague and ambiguous nature of the criteria, enumerated therein, Section 5-2-3 fails to meet the minimal requirements of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and as such, said provision is void and unenforceable.

In considering the constitutionality of licensing ordinances touching upon First Amendment freedoms, "precision of regulation must be the touchstone."

Interstate Circuit, Inc v Dallas, supra
N.A.A.C.P. v Button, 371 US 415.

Ordinances were struck down which provided that a permit could be granted for the distribution of religious publications if the city official deemed it "proper and advisable," or where the cause for which the applicant desired to solicit was "religious." *Largent v Texas*, 318 US 418 (1942) and *Cantwell v Connecticut*, 310 US 296 (1939). Ordinances were similarly held unconstitutional where no standards whatsoever were set forth to circumscribe the discretion of officials in granting or denying licenses.

Kunz v New York, 340 US 290 (1951)
Saia v New York, 334 US 558 (1947)
Lovell v Griffin, 303 US 444 (1937)
Niemotko v Maryland, 340 US 268 (1951)

In *Burton v Municipal Court of Los Angeles*, 68 Cal Rptr 721, 441 P 2d 281, the California Supreme Court said:

> "Examination of the ordinance involved in the instant case . . . undeniably reveals that it does not provide precise standards capable of objective measurement—the sensitive tools to be employed when-

ever First Amendment rights are involved . . . Section 103.29 (6) empowers the board to refuse a permit . . . (to engage in the business of exhibiting motion picture films to the public in any theatre for compensation) . . . if the applicant is 'unfit to be trusted with the privileges granted by such permit, or has a bad moral character, intemperate habits or a bad reputation for truth, honesty or integrity'. Such overly broad standards are fraught with the hazard that an applicant will be denied his rights to free speech and press through exercise of the power of the board, in its discretion, to refuse a permit because of the content of the films which the applicant exhibits in his theatre. For example, the board may consider than an applicant who has exhibited films offensive to the sensibilities of board members does not have 'good moral character' or is 'unfit to be trusted'. The same danger lurks in the board's discretionary power to refuse the permit if in its opinion the 'general welfare of the public' and its 'good morals' would not justify the issuance. Thus sections 103.29 (b) and 103.31 (c) 1 are unconstitutional as applied to petitioners in that they vest city officials with virtually unlimited discretionary power to grant or refuse permits and to impose a censorship or previous restraint upon constitutional rights."

In *Staub v City of Baxley*, 355 US 313 (1958), the court stated at p 322:

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

A cursory reading of the above provision would indicate that it fails to meet even the most minimal requirement and thus, constitutes a prior restraint upon the exercise of First Amendment rights and violates due process of law. How does one determine whether the violation of an ordinance or statute evidences a flagrant disregard for the safety or welfare of the patrons, employees or persons residing or doing business nearby? And in what context does the ordinance address itself? Does this refer to building code violations or violations pertaining to moral terpitude, and in any case, how is such a violation of the law related to the proposed business and the issuance of a license therefor? Standards like these are virtually incapable of measurement. And where no standards exist upon which to premise the grant or denial of a license, said provision is clearly void.

CONCLUSION

Whatever the label given to the ordinances at issue, whether designated zoning, licensing or penal in nature, their purpose, intent, operation and effect is to regulate and suppress free expression contrary to the First and Fourteenth Amendments to the Constitution of the United States. They are an unconstitutional abridgement of free speech and press.

The decision of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this _____ day of January, A.D. 1976.

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-312

ROMAN GRIBBS, Mayor of the City of Detroit, *et al.*,
Petitioners,

vs.

AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation,
Respondents.

ROMAN GRIBBS, Mayor of the City of Detroit, *et al.*,
Petitioners,

vs.

NORTOWN THEATRE, INC.,
Respondent.

Brief of Respondents American Mini Theatres, Inc. and Pussy Cat Theatres of Michigan, Inc.

Questions Presented.

1. Whether the Detroit ordinances, 742-G and 743-G, which limit severely the locations available within the City for the establishment of "adult" theatres and bookstores, deny Respondents the equal protection of the laws guaranteed by the Fourteenth Amendment

because the ordinances classify and impose restrictions upon theatres and bookstores disseminating constitutionally protected expression solely on the basis of the content of the expression, which classification is not necessary to further any compelling state interest, and is not even rationally related to any legitimate state interest.

2. Whether the Detroit ordinances, 742-G and 743-G, violate the free speech and press provisions of the First and Fourteenth Amendments, because the ordinances directly abridge protected expression and, alternatively, even if viewed as a regulation of non-speech elements in a course of conduct which incidentally limits First Amendment interests, the ordinances fail to further a compelling, important or substantial governmental interest, fail to serve any governmental interest unrelated to the suppression of free expression, and restrict the exercise of First Amendment freedoms in a manner far greater than essential to the furtherance of any legitimate governmental interest.

3. Whether the Detroit ordinance, 743-G, requiring adult theatres to be licensed by the Mayor, but permitting the Mayor to refuse such license on the basis of broad and indefinite standards, and which lacks any procedural safeguards, constitutes an impermissible prior restraint of First Amendment rights and further deprives persons desiring to operate adult theatres of the equal protection of the laws, contrary to the First and Fourteenth Amendments.

Statutes and Ordinances Involved.

Ordinance No. 742-G appears in Appendix "G" to the petition for writ of certiorari, pages 65-79.*

Ordinance 743-G appears in Appendix "H", pages 80-84.

Statement of the Case.

In 1962, the City of Detroit enacted §66.0000 of the Official Zoning Ordinance which classified certain businesses as "regulated uses." (App. G, p. 67; Pets. Br., p. 16). That section recited:

> "In the development and execution of this ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e., not more than two such uses within 1,000 feet of each other which would create such adverse effects). Uses subject to these controls are as follows:

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*In this brief, Respondents refer to the various appendices by their letter designation, such as Appendix "A", etc. Appendices A through I appear as appendices to the petition for

(This footnote is continued on next page)

Establishment for the sale of beer or intoxicating liquor for consumption on the premises.
Hotels or motels.
Pawnshops.
Pool or billiard halls.
Public lodging houses.
Secondhand stores.
Shoeshine parlors.
Taxi dance halls." (Brief for Petitioners, pp. 16-17).

Section 66.0100 provided:

"Application to establish any of above regulated uses shall be made to the City Planning Commission, who shall not approve any such request if there is already in existence two or more such regulated uses within 1,000 feet of the boundaries of the site of the proposed regulated use, excepting as provided for in §66.0101." (Pets. Br., p. 17).

Section 66.0101 permitted the Commission to waive the foregoing prohibition if the following findings were made:

"(a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this ordinance will be observed.

"(b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

"(c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.

a writ of certiorari herein. Appendices J through Q appear in the single appendix filed concurrently with the brief for the petitioners.

"(d) That all applicable regulations of this ordinance will be observed." (App. G, p. 68).

When the foregoing ordinances were enacted in 1962, the Detroit Common Council relied upon the opinions of Mel Ravitz, a Professor of Sociology with expertise in urban planning, and a member of the Common Council (App. J, p. 3). Ravitz wrote a letter in 1962 to an assistant corporation counsel setting forth in detail his reasons for supporting the above ordinance, known as the "Anti-Skid Row Ordinance" (App. J, pp. 8-12). Ravitz's 1962 letter stated, in pertinent part:

"The ordinance in question seeks to restrict concentration of six specified uses on the ground that any such concentration is an actual danger sign in a residential area.[1] It is such a threat in that it leads people to believe the neighborhood is declining, and more of the kind of people who accept a declining neighborhood flock there. This process hastens the reality of neighborhood decline.

* * *

"Another related point must be made, too: Many people who live in many areas view such concentration as undesirable and believe it is bad. Here a basic sociological axiom is relevant: If people believe something is true, even if it is

[1]The references in the letter to "residential" areas and neighborhoods is curious insofar as the designated "regulated uses" are not permitted at all in areas zoned exclusively for residential purposes, independent of the provisions of the "Anti-Skid Row Ordinance."

not originally, they will tend to act as if it were true, and in so doing help produce the condition that was originally only believed. If residents of any neighborhood believe that the concentration of the proscribed uses damage the neighborhood, they will act as if it were true and will seek to move away and allow in people with different standards; they will allow their property to decline; they will not engage in the full range of conservation attitudes and activities so necessary to the maintenance of a healthful residential neighborhood.

"As an actual fact that concentration of such proscribed uses where the people don't want them leads inevitably to rate cutting, indiscriminate displays of merchandise, illegal activities in order to attract scarce customers. These things, too, help to deteriorate a neighborhood.

"A residential neighborhood is a very fragile thing. It can be ruined very easily . . . . Ruin comes to a neighborhood because its residents somehow begin to have their confidence in their area shaken. It matters not what the cause of this shaken confidence, whether it be a legitimate or phony cause. Good neighborhoods are maintained because people who live in them believe that they are sound and good and will continue to be so in the months and years ahead. It is far too risky for a city to allow indiscriminately into residential areas any number of commercial uses which have already been identified as those whose concentration help shake people's confidence.

"The question has been raised: Why pick on these particular uses? The answer is simply that rightly or wrongly these uses in the minds of many people are the symbols of decay and deterioration. They certainly are not the only such uses that should be controlled; *all night movies*, burlesque shows, *drive-ins*, etc., also must be controlled, because they, too, have the same undesirable image. (Emphasis added).

"Let us recognize that most normal residential neighborhoods have a certain cohesion and stability that is sufficient to permit them to function adequately and healthfully and to resist a few such proscribed uses. A neighborhood can handle more such uses if they are spaced so as to have no more than two per 1,000 feet. While two was originally an arbitrary number, experience has shown that there is *some* justification for it." (Emphasis added). (App. J, pp. 9-11).

Ten years after the foregoing "Anti-Skid Row Ordinance" was enacted in reliance on the views of Councilmember Ravitz, the Council enacted Ordinance 742-G (App. G, p. 65), amending the Anti-Skid Row Ordinance by including "adult" theatres and bookstores and group "D" cabarets (topless) in the category of "regulated uses." No new statements of purpose or legislative findings accompanied the addition of adult bookstores and theatres to the "skid row" classification.

An "adult bookstore" is defined as "an establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals

which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Area,' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material." "Specified Sexual Activities" and "Specified Anatomical Areas" are broadly defined to include, *inter alia*, "fondling" of the buttocks or female breasts as well as mere nudity (App. G, pp. 66-67).

At the same time, a new section was added, §66.0103, prohibiting the location of any adult bookstore, adult theatre, or class "D" cabaret within 500 feet of any building containing a residential, dwelling or rooming unit unless the prohibition was waived by the consent of 51% of the persons living or doing business within 500 feet of the proposed location (App. G, p. 69).[2]

In 1972, the City also enacted Ordinance 743-G (App. H, p. 80), amending the Detroit Municipal Code to require that adult theatres (although not adult bookstores) be licensed by the Mayor who was granted discretion to refuse to issue or to revoke licenses

> ". . . upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance

[2]The District Court held this provision unconstitutional, and the City did not appeal. Although the City subsequently amended the 500 foot provision to preclude adult theatres and bookstores within 500 feet of any "residentially zoned district" (App. I, p. 84), that ordinance was not before the District Court or the Court of Appeals, and, of course, is not before this Court.

> of this City regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." (App. H, pp. 80-82).[3]

On May 1, 1973, Respondents AMERICAN MINI THEATRES, INC. and PUSSY CAT THEATRES OF MICHIGAN, INC. filed their Complaint in the District Court. The Complaint alleged that AMERICAN MINI THEATRES, INC is the lessee of certain property located in the City of Detroit on which it constructed a motion picture theatre which, on or about December 21, 1972, had passed all inspections required by the City of Detroit. PUSSY CAT THEATRES OF MICHIGAN, INC. was alleged to be the operator of the theatre pursuant to an agreement with AMERICAN MINI THEATRES, INC., and was alleged to have been operating the theatre as an adult-type theatre since January 5, 1973. The Complaint alleged that the City had refused to issue a certificate of occupancy for the theatre in reliance upon the provisions of Ordinances 742-G and 743-G. Respondents contended that the two ordinances are unconstitutional, *inter alia*, in that they inhibit and prohibit the display to adult persons of motion picture films protected under the First and Fourteenth Amendments to the United States Constitution, are

[3]The licensing provisions of Ordinance 743-G were attacked as unconstitutional in the Complaints filed by Respondents. However, the licensing provision was not discussed specifically either by the District Court or the Court of Appeals.

vague and overbroad thereby invading rights guaranteed by the First and Fourteenth Amendments, and deprive persons of the equal protection of the law contrary to the First and Fourteenth Amendments, by imposing restrictions on adult theatres which restrictions are not applicable to all other theatres. The Complaint prayed for declaratory and injunctive relief.

Petitioners moved for summary judgment, and the motion was consolidated for hearing with a similar motion filed in a similar action brought by Respondent NORTOWN THEATRE, INC. By stipulation, the two cases were heard on the same motions, briefs, and affidavits (App. M, p. 51).

In support of its motion, Petitioners submitted five affidavits and a memorandum from a policeman in the "Obscenity Detail." All of the affidavits and supporting exhibits deal exclusively with the provision prohibiting no more than two "regulated uses" within 1,000 feet.

1. Affidavit of Mel Ravitz (App. J, pp. 3-8).

After setting forth his qualifications as a member of the City Council, Professor of Sociology, and urban planner, Ravitz states his reasons for supporting the validity of the 1,000 foot provision, tracking almost verbatim the contents of his 1962 letter supporting the original Anti-Skid Row Ordinance. In so doing, Ravitz does not discuss specifically the relationship, if any, between adult bookstores and theatres and neighborhood blight. Instead, his analysis is a general one, lumping together adult bookstores and theatres with bars, motels, pawnshops, taxi-dance halls, and topless cabarets (App. J, p. 5). In the undifferentiated

analysis contained in his affidavit, as in his letter of ten years prior, Ravitz's central theme is that since people tend to believe that the "regulated uses" cause a neighborhood to deteriorate, their fears and apprehensions, even if unfounded in the first instance, will cause them to act in accordance with their prejudices, and neighborhood blight then becomes a self-fulfilling prophesy.

In Ravitz's analysis, the designated businesses are "symbols of decay and deterioration" (App. J, p. 6) which "leads people to believe the neighborhood is declining" (App. J, p. 5), and causes residents and businessmen to neglect their own property or to move away, leaving the neighborhood to the less respectable or less fortunate.

2. Memorandum From Police Officer Smith of the "Obscenity Detail" to Assistant Corporation Counsel Reilly Dated April 10, 1973 (App. J, p. 13).

This memorandum lists the "adult type businesses" by areas of the City, noting the "escalation" of adult bookstores and theatres "Since the Redrup decision, (Magna Carta for pornographers)." (App. J, p. 13).

3. Affidavit of William P. Walsh (App. J, p. 16).

Walsh's affidavit sets forth his qualifications as a realtor with experience in real estate appraisal and consulting services. The reasons stated by Walsh in support of the 1,000 foot restriction parallel those of Ravitz. In Walsh's opinion, the "regulated uses" tend to "create a concern and even hostility in the minds of the persons living and working nearby" and "act as a deterrent to prospective buyers of businesses

and residences within the area"; (App. J, p. 19); that the designated businesses are "associated in the minds of the prospective buyers with unstable and declining property values" (p. 20); that when it first appears that these types of businesses "are beginning to cluster in a neighborhood," nearby residents and businessmen who can afford to move "will immediately offer their property for sale"; and that "the anticipation whether or not warranted in fact is sufficient to and does cause the property owners to flee the area" (p. 20); that the appearance of more than one or two vacant storefronts or "for rent" signs in a business district, "creates an apprehension in the minds of the prospective buyers who reject the neighborhood as being unstable," and that other neighboring residents and businessmen believe their property values are in jeopardy and thus offer their homes and businesses for sale to " 'get out while the getting's good' " (p. 20); that the location of adult bookstores, adult theatres and "cabarets which offer topless dancing," because of the fact that they "cluster together," "within a very short time create in the minds of the adjacent residents and businessmen the same concern and hostility" which is evoked upon the appearance of the other "regulated uses." (p. 21).

To Walsh, as well as to Ravitz, the fear of and hostility to certain kinds of businesses in the minds of surrounding residents and businessmen, even if such fear and hostility is unfounded, is sufficient reason to limit the number of those businesses deemed offensive by existing residents on the basis of their personal prejudices.

4. Affidavit of Ogust Mai Stewart (App. J, p. 22).

Stewart's affidavit states that she and her husband are the owners of a real estate business located in an area of the City generally comprised of "banks, supermarkets, restaurants, typical gasoline stations, and other related service stores." (p. 22). She observes that during the past nine months "several pornography businesses have invaded" a two block section of the neighborhood; that "This two block strip is ablaze with multi-colored expensive neon signs that publicize a variety of offerings" and that "Shock, disgust and utter disbelief at the influx of this kind of business compels me to file this affidavit" (pp. 22-23); that "I cannot prove the point, but I am inclined to believe that some prurients' [sic] shops tend to draw sex deviates" (p. 23); that these businesses attract "undesirable persons" and turn away "desirable potential buyers" (p. 24); that these businesses "evoke an adverse reaction from the prospective buyer who believes that these businesses indicate a declining neighborhood" (p. 24); that "legitimate" business properties are thereby depreciated in value (p. 24).

Stewart's affidavit, aside from expressing her "shock" and "disgust" at the establishment of "pornography businesses" near her own business, restates the theory of self-fulfilling prophesy expounded by Ravitz and Walsh. Stewart's affidavit, just as Ravitz and Walsh's, states no facts concerning the alleged adverse impact of adult theatres and bookstores on a surrounding community other than those thought to flow from the unsupported fears and hostility of existing residents.

5. Letter From Carl H. Schmidt, Jr. to Mayor Gribbs Dated August 11, 1972 (App. J, p. 26).

Mr. Schmidt's letter advises the Mayor that he intends to move his company out of the City primarily because an adult bookstore has located next door. Mr. Schmidt asserts that the store has "pornography available in their back room" which he finds "disgusting" and states that he has "no desire to be this close to it or the people frequenting the store." (p. 26). Mr. Schmidt lists as additional reasons for his decision, the fact that his office and car were broken into and robbed on several occasions, and that "Detroit has a corporation tax and personal income tax, plus several other taxes which do not help the matter." (p. 27).

6. Letter From Mayor Gribbs to Carl H. Schmidt, Jr. Dated September 21, 1972 (App. J, p. 28).

Mayor Gribbs' answer to Mr. Schmidt's letter states that he shares Mr. Schmidt's concern regarding the "adverse effects" of adult bookstores; that he has established a "Task Force on Licensing Procedure" to review, enforce, and strengthen "our existing municipal codes in regard to legally defined obscenity and pornography"; that the task force has recently submitted to the Common Council a "package of sweeping new proposals to regulate and control adult bookstores and theatres"; that court cases are being reviewed to assist "in establishing effective enforcement of obscenity ordinances" (p. 28); and that the Mayor is sending an envoy to meet with Mr. Schmidt "to discuss our plan to abate this public nuisance." (p. 29).

7. Affidavit of Gail Sheehy (App. J, p. 29).

Sheehy's affidavit sets forth her qualifications as a journalist who has investigated and written about "the impact of the location of adult entertainment businesses in Manhattan, New York" (p. 30). Sheehy's theory is that prostitution and street crime result from the establishment of adult entertainment businesses. She espouses a domino theory in which "First appears the dirty bookstore," "Next follows the coin box peep show," "One day a live sex show sprouts from a storefront, then a massage parlor, then two massage parlors and a pornographic movie, two pornographic movies and a prostitution hotel" (pp. 30-31); eventually "The neighborhood is left in the grip of Mafia-backed massage parlor and hotel operators", "Murphy men, cruising pimps, prostitute muggers, youth gang ripoff artists and the addicts who lie in wait for any of the above, until they accumulate enough cash, and then jump them for a fix" (p. 31). Sheehy's ultimate concern, however, is with the prostitution and street crime which, in her opinion, emanates from massage parlors and prostitution hotels. The Detroit ordinances at issue do not designate as "regulated uses" massage parlors or similar businesses which have the potential for being fronts for prostitution, and Sheehy does not explain why it is necessary to limit the number of adult theatres and bookstores in order to prevent the establishment of massage parlors and prostitution hotels. Sheehy does not even contend, much less state facts to prove that the establishment of adult bookstores and theatres, as distinct from massage parlors and prostitution hotels, cause any of the "street crime" with which she is concerned.

8. Affidavit of Lino Canevaro (App. J, p. 37).

Canevaro's affidavit states that he is a head planner with the Detroit City Plan Commission and was in charge of the drafting of the present zoning ordinance. He states the bald conclusion, unsupported by any statement of facts or supporting reasoning, that "The commercial uses which have a tendency to create blighting conditions include: Bars, pawnshops, pool or billiard halls, shoeshine parlors, taxi-dance halls, secondhand stores, adult bookstores, adult theatres, and cabarets. The transient residential uses with this same potential includes: Public lodging houses (flop houses), motels, and hotels." (p. 38). The affiant asserts that when the "right mixture" of the foregoing uses are concentrated in a small area, a "skid row" results (p. 39). Canevaro then states that aside from the "deleterious appearance" usually associated with such an area, numerous social problems are generated by skid rows, including "the alcoholic, the drug addict, prostitution, crime, low rent housing for the single adult attracting senior citizens on a fixed income, the mission church, food kitchens, pan-handlers, and generally an assembly point for all the human derelicts of society." (p. 39).

In common with all the other affidavits, Canevaro's does not speak specifically to the question of whether adult bookstores and theatres, in particular, cause any ill effects upon the surrounding neighborhood, but rather describes a whole string of businesses generally deemed odious, and without any analysis includes adult bookstores and theatres in this benighted classification. It may well be that the deteriorated neighborhoods commonly known as "skid rows" do generate the "numerous social problems" specified by Canevaro, but the

affiant makes no attempt to establish the unlikely proposition that the location in a neighborhood of adult bookstores and theatres generates the social problems of alcoholism, drug addiction, or prostitution, much less the alleged social problems of low rent housing for senior citizens, mission churches, or food kitchens.

Respondents answered Petitioners' motion for summary judgment by contending that they, rather than Petitioners, were entitled to judgment as a matter of law (App. K, p. 40). In support of their answer, Respondents submitted the affidavit of James C. Rogers (App. K, p. 41). Rogers sets forth extensive qualifications as a real estate appraiser and consultant (pp. 41-44). Rogers states that he has read the affidavits of Ravitz, Walsh, and Stewart, and that each "pertains to the negative reactions of persons to the use or occupancy of adjacent real estate; that none of the affidavits contain any evidence of reduced market value of abutting properties due to the establishment of so-called 'adult' bookstores or theatres and the negative attitudes engendered thereby." (p. 44). Rogers states that there are many factors which have tended to, and will continue to, reduce property values in the City of Detroit, including racial and socioeconomic changes in neighborhoods, real estate financing, crime, city income tax, a defunct school system, etc. (p. 44); that it cannot be said that the establishment of an adult bookstore or theatre either has or will destroy a neighborhood or the values of the properties therein (p. 44). Rogers states that he has studied available data concerning sales of property in one of the areas of Detroit in which adult theatres and bookstores have located, and concludes that residential

values in the neighborhood have increased over the past two to two and a half years (pp. 44-45).

The consolidated motions for summary judgment came on for hearing in the District Court on September 17, 1973 before District Judges Kennedy and Gubow. At oral argument, counsel for the City argued that the ordinances in question were designed to curtail the establishment of theatres and bookstores dealing in sexually oriented material for the reason that existing criminal and civil remedies against obscenity, pursuant to the interpretive decisions of this Court, were insufficient to stop the sale and exhibition of such matter.

> "We know now that the Court has said that any material which is proven to be obscene may be entirely prohibited; and yet we must be realistic and face facts. It is only after such movies as 'Deep Throat' are actually found to be obscene that they may be prohibited.
>
> * * *
>
> "So 'Deep Throat' continues to be shown. The concern of the neighborhood over the showing of this kind of movie has been evidenced time and again by picketing, by calls and letters to our office, to the Mayor, to the Common Council and so on.
>
> * * *
>
> "And the City must take some kind of action. It cannot sit back and wait until this material is finally determined to be obscene or not.
>
> * * *
>
> "And yet we know that until these kinds of magazines are taken to court one by one, on a piece-meal basis, there is no way that we can stop the sale or dissemination of this kind of material." (App. L, pp. 47-49).

On March 22, 1974, the District Court filed an opinion in the consolidated cases upholding the validity of those portions of the ordinances which relate to the prohibition against two or more regulated uses within 1,000 feet, but declaring invalid those portions of the ordinances prohibiting such uses within 500 feet of a dwelling unit (App. D, p. 60). The order and judgment filed by the District Court were to the same effect (App. E, p. 61; App. F, p. 63).

Petitioners did not appeal from that portion of the judgment declaring invalid the prohibition of adult theatres and bookstores within 500 feet of a residential unit. Respondents appealed to the Court of Appeals for the Sixth Circuit from that portion of the judgment upholding the validity of those provisions of the ordinances prohibiting the establishment of more than two "regulated uses" within 1,000 feet. On June 16, 1975, the Court of Appeals issued its opinion holding the ordinances unconstitutional under the equal protection clause of the Fourteenth Amendment, because they impose burdens only on one category of theatres and bookstores, those selling and exhibiting "adult," albeit constitutionally protected materials and therefore discriminate against constitutionally protected books, magazines and films solely on the basis of their content (App. A, p. 15).

The Detroit authorities filed their Petition for Certiorari on August 28, 1975, and certiorari was granted on October 20, 1975.

Summary of Argument.

1. The provisions of the Detroit zoning ordinances limiting severely the locations available within the City for the establishment of "adult" theatres and bookstores deny Respondents the equal protection of the laws guaranteed by the Fourteenth Amendment. The ordinances create a classification of "adult" theatres and bookstores based solely upon the nonobscene contents of the media of communication sold or exhibited. Petitioners concede, as they must, that this classification of constitutionally protected expression based upon its content affects fundamental First Amendment interests of Respondents and the public generally and accordingly is subject to strict judicial scrutiny.

Because the ordinances on their face create a classification based upon the content of concededly protected expression, Detroit's scheme is not entitled to the usual presumption of validity, but the City rather must shoulder a heavy burden of justification to show that its classification is narrowly tailored to serve a compelling state interest and that it has selected means that do not unnecessarily burden constitutionally protected interests. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

Detroit contends that because its ordinances are enacted pursuant to its zoning power, they should be sustained pursuant to this Court's decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In that case, however, the Court held that the zoning ordinance there involved did not affect fundamental constitutional rights and was not subject to strict judicial scrutiny. "Zoning," like all other labels of state law, can claim no talismanic immunity from constitutional limitation.

Detroit alleges that its zoning ordinances are designed to prevent adult theatres and bookstores from contributing to neighborhood blight and deterioration. The City contends such interest is not only legitimate, but compelling. But Detroit's abstract statement of its governmental interest must yield to a concrete analysis of the actual interests underlying these ordinances as revealed by the record in this case.

Respondents contend that an examination of the record establishes at best an interest in restricting unpopular speech deemed offensive by residents and businessmen on the basis of their unfounded and undifferentiated fears and apprehensions concerning the effect of adult theatres and bookstores on surrounding neighborhoods. At worst, the City's interest is no more than a naked desire to restrict by zoning sexually oriented expression that lies beyond the reach of the State's and City's criminal laws.

Petitioners admit that the ordinances were enacted largely upon the self-fulfilling prophesy theory espoused by Dr. Ravitz, and contained in the other affidavits as well, that in the absence of proof that adult bookstores and theatres themselves cause neighborhood blight, the City should nevertheless stop them from "clustering" because they evoke in the minds of surrounding residents and businessmen an image of "decay and deterioration," causing "concern and hostility," "shock, disgust and utter disbelief," all of which "rightly or wrongly" causes the neighboring citizens to react to their own preconceived notions.

Whatever the extent of state power to regulate unprotected obscenity on the basis of "unprovable assumptions" concerning the effect of obscenity on the "quality

of life," the "total community environment" and the "tone of commerce in the great city centers" (*Paris Adult Theatre I v. Slaton*, 413 U.S. at 63, 58), this Court always has condemned state action restricting protected speech where the alleged state interest is the protection of a non-captive audience from unpopular, controversial or offensive speech and where the basis of the state action is nothing more than undifferentiated fear and apprehension. The Court has been particularly critical of restrictions on speech based upon predictions of adverse consequences thought likely to flow from a broad category of expression, as opposed to such judgments made on an individualized basis. Simply because some citizens, or even a majority, have an unfounded fear that adult theatres and bookstores will blight a neighborhood is no justification for restricting the right of such businesses to locate in areas otherwise zoned for such commercial uses where sufficient patronage exists to sustain two or more such businesses. The fact, if it be a fact, that the mere presence of an adult bookstore or theatre in an area zoned to permit commercial establishments induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger cannot justify restricting the entry of the theatre or bookstore.

In short, a state has no legitimate interest, much less a compelling or substantial interest, in restricting the location of adult theatres and bookstores merely because residents are offended by their mere presence, perceive them as "symbols of decay and deterioration," and believe, without basis in fact, that they lead to neighborhood blight. Similar interests have been asserted to justify the exclusion of black citizens from white

neighborhoods, but this Court long ago refused to countenance discrimination for such reasons. *Buchanan v. Worley*, 245 U.S. 60 (1917).

In its Brief, Detroit urges another interest illegitimate on its face. It is contended that these zoning ordinances are necessary to limit the spread of adult theatres and bookstores which the City is unable to control by means of its criminal and civil obscenity laws. Such a state interest in censoring undesirable films and books, which have not been declared obscene, in a way which makes resort to the criminal laws dealing with obscenity largely unnecessary is not a legitimate interest. On the contrary, it is nothing more than a desire to establish prior restraint on freedom of expression without the necessary procedural safeguards.

Even if Detroit's alleged interest in preventing the "clustering" of adult theatres and bookstores on the basis of the public's undifferentiated fears and apprehensions concerning expression deemed offensive could be considered a legitimate state interest, such interest nevertheless is not sufficiently compelling or substantial to justify discriminating among classes of constitutionally protected expression solely on the basis of content. Government action which imposes restrictions or burdens on selective classes of expression on the basis of its content or message is the essence of censorship forbidden by constitutional principles of equal protection and freedom of speech and press. The decisions of this Court are legion in which governmental action restricting protected expression on the basis of its message has been condemned. Such discrimination is forbidden under the equal protection clause and the

First Amendment save in the most narrow and exceptional cases. The governmental interests asserted by Detroit in support of its discriminatory zoning ordinances are not the kind of compelling or substantial state interests which could justify such content-based classification.

Even if the interests asserted by Detroit as the objectives of the zoning ordinances could be deemed compelling or substantial, Detroit nevertheless has failed to sustain its heavy burden of proving such classification necessary to achieve the alleged interests. The means selected by Detroit are not narrowly tailored to achieve the state interests. The affidavits and exhibits submitted by the City in the District Court contain nothing more than sweeping generalizations plainly based on the adverse consequences of the concentrations of the "regulated" skid row businesses other than adult theatres and bookstores. None of the affidavits or exhibits contain any particularized showing that adult theatres and bookstores, as distinguished from flop houses, bars, pawnshops and the like, contribute in any manner whatsoever to the deterioration of surrounding neighborhoods. When a City attempts to impose restrictions upon a particular class of constitutionally protected speech solely on the basis of its content, its burden of proving that the classification is necessary to achieve a compelling state interest cannot be discharged by generalized statements of opinion such as Detroit has submitted here.

Not only is there no evidentiary basis to support Detroit's assertion that adult theatres and bookstores contribute to neighborhood blight, but empirical research funded and directed by the Commission on

Obscenity and Pornography created by the United States Congress suggests the absence of the alleged causal relationship.

In addition to the lack of factual support for Detroit's contention that adult theatres and bookstores cause neighborhood decay, the City's classification of "regulated uses" is both under-inclusive and over-inclusive. Detroit's principal witness, Dr. Ravitz, stated in 1962 when the "Anti-Skid Row" Ordinance was originally enacted, that all-night movies and drive-in theatres also must be controlled because "they, too, have the same undesirable image." Yet, the 1972 amendment failed to include all-night movies and drive-in theatres in the category of "regulated uses." These uses are distinguished by operational characteristics which might well contribute to a skid row atmosphere, independent of the content of the films exhibited. Yet they are not included. Similarly, massage parlors and other commercial establishments with potential for becoming places of prostitution were not included in the category of "skid row" uses, although massage parlors are prominently mentioned in one of the affidavits submitted by Petitioners in the District Court. Other uses identified in the affidavits as contributing to a skid row atmosphere, such as mission churches and rescue missions, are not included in the designation of "regulated uses." On the other hand, the inclusion of adult theatres and adult bookstores in the skid row category is unsupported by the evidence in the record. The City made no showing that adult theatres and bookstores properly belong in this category.

An additional interest is asserted by Detroit as underlying its classification. This additional interest ap-

pears in the City's Brief although it was not urged in the District Court and finds no support in the record. Thus, Petitioners suggest that the ordinances are intended to protect residential districts. But is it clear that the prohibition against more than two "regulated uses" within 1,000 feet of a proposed location was not designed to protect residential neighborhoods. Detroit already is zoned into residential, commercial and industrial areas, and the 1,000 foot provision is merely superimposed upon the basic zoning scheme. Nor can the ordinances be justified on any theory of protecting minors.

To the extent that any legislation is necessary to promote a compelling state interest in preventing adult theatres and bookstores from contributing to neighborhood blight, less drastic means are available which do not broadly stifle First Amendment interests. There are physical and operational characteristics of these and all other commercial establishments which may contribute to the appearance of neighborhood blight and resulting actual deterioration. Legislation aimed at improving the physical condition and appearance of public buildings can help prevent a skid row appearance without discriminating against any class of protected speech. Other narrowly tailored, nondiscriminatory legislation may be enacted.

2. The Detroit ordinances limiting severely the locations available within the City for the establishment of adult theatres and bookstores violate the free speech and press provisions of the First and Fourteenth Amendments.

In the first place, it must be emphasized that state power to restrict First Amendment interests is no greater

because exercised in the name of "zoning." It is the character of the right, not of the limitation, which governs the standard of judicial review. Zoning, like all of the various formulae for the repression of expression that have been challenged in this Court can claim no talismanic immunity from constitutional limitations, but must be measured by standards that satisfy the First Amendment. Thus, a mere showing of a legitimate state interst will not suffice to justify the ordinances, for even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone, and the least drastic means of satisfying even legitimate interests must be selected. The interest of the State in limiting First Amendment freedoms must be compelling.

Nor can the ordinances survive a First Amendment challenge merely because they restrict, but do not altogether prohibit, the locations available for the establishment of adult theatres and bookstores. First Amendment freedoms must not, in the guise of regulation, be abridged or denied. The decisions of the Court always analyze alleged "regulation" of First Amendment rights to determine the actual impact of the legislation, lest First Amendment freedoms be chipped away piece by piece. Legislation which directly burdens or deters protected expression will not be upheld merely because speech is not forbidden altogether. The fact of the matter is that the ordinances here impose a significant interference with the First Amendment interests of Respondents, other persons similarly situated, and the public generally. The ordinances severely restrict the locations available for the establishment of adult theatres and bookstores within the City. Because these severe

restrictions do not apply to theatres and bookstores generally, the ordinances constitute an effort by the City to determine the content of available expression. This is the essence of governmental censorship.

The zoning ordinances here must be analyzed as a direct abridgment of First Amendment interests, not as a regulation of non-speech elements in a course of conduct which only incidentally limits First Amendment interests. *United States v. O'Brien*, 391 U.S. 367 (1968) is not here applicable. In the first place, the present ordinances, unlike the statute in *O'Brien*, restrict First Amendment rights on their face. Secondly, even if it can be said that the establishment of an adult theatre or bookstore in a particular location is "conduct," nevertheless both the objective and operation of the ordinances is with the communicative aspect of the alleged conduct. In the present case, unlike *O'Brien*, the governmental interest in regulating the alleged conduct of establishing adult theatres and bookstores arises because the communication integral to the conduct is itself thought to be harmful. A statute which limits First Amendment interests on the basis of the content of expression never can be analyzed as a mere "incidental" restriction of free speech arising from governmental regulation of conduct intertwined with speech.

But even if the ordinances are analyzed as an "incidental" limitation on speech resulting from governmental regulation of a single course of conduct involving both speech and non-speech elements, the ordinances fail to satisfy the *O'Brien* tests. In the first place, the ordinances are not within the constitutional power of the Government. This is because Detroit's interest in preventing the "clustering" of adult theatres and

bookstores because of the public's undifferentiated fears and apprehensions concerning theatres and bookstores disseminating speech deemed offensive is not a legitimate state interest. Secondly, the interests principally asserted by Detroit are not so important, substantial, or compelling as to justify a restriction of First Amendment rights based solely on the content of expression. Thirdly, even if Detroit's interests are legitimate and compelling, the means selected have not been proved necessary to achieve the objectives. The City has failed to sustain its heavy burden of proving its content-based classification necessary to achieve the alleged interests. Moreover, the means selected are not narrowly tailored to achieve the objectives. Fourth, the interests asserted by Detroit are not unrelated to the suppression of free expression. Detroit's alleged interests arise because the "adult" communication integral to the "conduct" of establishing adult theatres and bookstores in particular locations is itself deemed harmful, and the state interests therefore are directly related to the restriction of First Amendment rights. Finally, Detroit's "incidental" restriction on First Amendment rights is greater than essential to the furtherance of its alleged governmental interests. To the extent any legislation is necessary to prevent adult theatres and bookstores from contributing to neighborhood blight, less drastic means are available which do not broadly stifle First Amendment interests.

The zoning ordinances cannot be upheld as time, place, or manner regulations because they discriminate against one class of expression on the basis of content. The Court consistently has held that valid time, place or manner regulations of speech must be neutral and cannot impose restraints on the basis of the content of expression.

The zoning ordinances cannot be upheld under a theory of protecting a "captive audience." This alleged interest, asserted by Petitioners for the first time in their Brief, is totally without foundation. The ordinances do not regulate the manner in which adult theatres or bookstores may operate, but rather limit their ability to locate within a specified distance from other "regulated uses." The ordinances are not directed at any alleged thrusting of offensive communication upon persons unable to avoid exposure. Nor is there here any issue of whether a public forum for First Amendment activity has been established.

The zoning ordinances cannot be justified as a governmental effort to protect minors from sexually oriented materials. The ordinances are not directed to preventing the establishment of adult theatres and bookstores in locations where children are likely to congregate. Nor is the 1,000 foot provision in any way designed to "protect" exclusively residential neighborhoods. The present ordinances do not reveal a limited and focused state concern to shield juveniles from sexually explicit matter.

Finally, the waiver provisions of §66.0101 do not save the ordinances because the Commission's authority to waive the 1,000 foot provision is wholly discretionary, and lacking in narrow and definite standards.

3. Detroit ordinance 743-G, requiring adult theatres to be licensed by the Mayor but permitting the Mayor to refuse such license on the basis of broad and indefinite standards, and lacking any procedural safeguards, constitutes an impermissible prior restraint of First Amendment rights and further deprives persons desiring to operate adult theatres of the equal protection of the laws, contrary to the First and Fourteenth Amend-

ments. The ordinance requires adult theatres, but not adult bookstores or theatres generally, to be licensed by the Mayor. The Mayor is granted discretion to refuse to issue a license, and to revoke any license already issued, on the basis of standards which are so broad and imprecise as to permit unbridled prior censorship. The ordinance permits the Mayor to deny a license because any employee of the applicant has violated a city ordinance which, in the Mayor's opinion, "evidences a flagrant disregard" for the public welfare. Such broad discretion in administrative licensing schemes affecting First Amendment rights frequently have been condemned by the Court.

In addition, the licensing scheme contains none of the procedural safeguards required by this Court where such schemes operate as a prior restraint of free speech. See, *Freedman v. Maryland*, 380 U.S. 51 (1965). The Michigan state courts have not construed the ordinance to provide the necessary procedural safeguards, and this Court lacks jurisdiction to read the *Freedman* requirements into a municipal ordinance.

Further, Detroit not only has singled out "adult" theatres from all other theatres in imposing a license requirement, but it further has distinguished between adult theatres and adult bookstores, the latter not being required to be licensed. Yet the record contains not so much as a suggestion as to why only adult theatres need be licensed any more than theatres generally, or why if the "adult" nature of the material is determinative adult bookstores are exempted. The conclusion necessarily follows that Detroit's conduct in singling out adult theatres is an invidious discrimination in violation of the equal protection clause.

ARGUMENT.

I.

The Detroit Ordinances, 742-G and 743-G, Which Limit Severely the Locations Available Within the City for the Establishment of "Adult" Theatres and Bookstores Deny Respondents the Equal Protection of the Laws Guaranteed by the Fourteenth Amendment Because the Ordinances Classify and Impose Restrictions Upon Theatres and Bookstores Disseminating Constitutionally Protected Expression Solely on the Basis of the Content of the Expression, Which Classification Is Not Necessary to Further Any Compelling State Interest, and Is Not Even Rationally Related to Any Legitimate State Interest.

A. The "Inverse Zoning" Ordinances Create a Classification of "Adult" Theatres and Bookstores Based Solely Upon the Nonobscene Content of the Media of Communication Sold or Exhibited. This Classification of Constitutionally Protected Expression Based Upon Content Affects Fundamental First Amendment Interests of Respondents and the Public Generally and Thus Is Subject to Strict Judicial Scrutiny; The City Has the Burden of Proving the Classification Necessary to Promote a Compelling State Interest.

Both the majority and the dissenting opinions in the Court of Appeals agree that Detroit's attempt to limit the locations available for the establishment of "adult" theatres and bookstores affects First Amendments interests. The City itself concedes that "it is regulating the manner in which material, presumably protected by the First Amendment, may be disseminated." (Pets. Br., p. 23). The City further concedes that "The equal protection clause requires that statutes affecting First Amendment interests be narrowly tai-

lored to their legitimate objectives. *Williams v. Rhodes,* 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5 (1968)." (Pets. Br., p. 53). The City's concessions, of course, are compelled by the language of the ordinances and the decisions of this Court reviewing legislative classifications affecting fundamental interests protected by the Federal Constitution.

There is no dispute that the ordinances restrict the locations available for the establishment only of those theatres and bookstores classified as "adult," and that the ordinances' definition of "adult" is based solely upon the content of the books, magazines or films sold or exhibited. It is also undisputed that the definition of "adult" is broader than the class of unprotected obscenity which the States may regulate without having to justify the regulation as anything more than a rational means of achieving a legitimate state interest. See, *Miller v. California,* 413 U.S 15 (1973); *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973). It is established that "The setting of the bookstore or the commercial theatre" is "each presumptively under the protection of the First Amendment" [*Roaden v. Kentucky,* 413 U.S. 496, 504, 93 S.Ct. 2796 (1973)] and that material frankly describing or depicting nudity and sexual activity is as fully protected from governmental restraint as all forms of pure speech, unless the material falls within the narrow category of obscenity. See, *Roth v. United States,* 354 U.S. 476 (1957); *Jenkins v. Georgia,* 418 U.S. 153 (1974). Further, this Court's recognition of state power to regulate the dissemination of obscenity, properly defined, implies no recognition of state power to restrict the dissemination to the general public of sexually oriented publications and

films which are not obscene. *Smith v. California*, 361 U.S. 147, 152 (1959); *Marcus v. Search Warrants of Property*, 367 U.S. 717, 730 (1961).

Because the ordinances on their face create a classification based upon the content of protected expression, the City bears the heavy burden of justifying the classification under the strict scrutiny standard of judicial review under the equal protection clause. See, *Williams v. Rhodes*, 393 U.S. 23 (1968); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16, 34, n.75 (1973); *Storer v. Brown*, 415 U.S. 724 (1974); *Lubin v. Panish*, 415 U.S. 709 (1974); *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268, 2275-2276 (1975); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 451 (1974) (concurring opinion of Mr. Justice Powell).

Thus, in *San Antonio Independent School District v. Rodriguez, supra*, 411 U.S. at 16, the Court stated that "strict judicial scrutiny" is the appropriate standard for reviewing legislative judgments "that interfere with fundamental constitutional rights," and the Court noted that the strict standard of review was appropriately applied to the ordinance involved in *Police Department of the City of Chicago v. Mosley, supra*, since the ordinance was one " 'affecting First Amendment interests' " (411 U.S. at 34, n.75). The applicable standard of review was described by the Court in *San Antonio*, 411 U.S. at 16-17:

> " . . . strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that

> the State must demonstrate that its . . . system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives. . . ."

See also, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262-263 (1974) [State bears "heavy burden of justification" to establish that classification burdening fundamental constitutional rights serves compelling state interest and that State "has chosen means that do not unnecessarily burden constitutionally protected interests"]; *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268, 2277 (1975) [Classification affecting First Amendment interests must satisfy "rigorous constitutional standards"; "precision of drafting and clarity of purpose are essential"].

Accordingly, Respondents turn to an analysis of whether Detroit can satisfy its heavy burden of justifying this legislative classification of protected expression on the basis of its content.

B. Detroit's Interest in Preventing the "Clustering" of Adult Theatres and Bookstores Because of the Public's Undifferentiated Fears and Apprehensions Concerning Theatres and Bookstores Disseminating Speech Deemed Offensive Is Not a Legitimate, Much Less a Compelling or Substantial, Governmental Interest.

1. Detroit seeks to cloak its content-based classification in the protective mantle of zoning, one of the States' police powers long recognized as legitimate. Thus, the City relies upon this Court's decisions upholding zoning ordinances in *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926); *Berman v. Parker*,

348 U.S. 26 (1945), and *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). But none of these decisions involved a zoning ordinance affecting fundamental constitutional rights. See, *e.g.*, *Village of Belle Terre, supra*, 416 U.S. at 7 [The ordinance "involves no 'fundamental' right guaranteed by the Constitution"]. Accordingly, the zoning ordinances there involved were upheld merely as rational means of furthering legitimate state objectives. None of the Court's zoning decisions stand for the proposition that zoning ordinances enjoy any special immunity from the rigorous standards of judicial review applicable where legislative classifications affect fundamental First Amendment interests. "Zoning," no more than "libel" or any other "mere labels" of state law, can claim any talismanic immunity from constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

The City asserts that its zoning ordinances are designed to achieve two legitimate governmental purposes, which it contends are compelling:

> "1. To avoid clustering of adult businesses and reasonably restrict the number of regulated uses which may locate in any business district serving a neighborhood;
>
> "2. To insure the continued support and commitment to the neighborhood of those persons presently residing and doing business therein." (Pets. Br., p. 9).

Stated abstractly, a governmental interest in preventing urban blight and neighborhood deterioration is undoubtedly legitimate. But even in cases not requiring strict judicial scrutiny, "This Court need not in equal protec-

tion cases accept at face value assertions of legislative purposes. . . ." *Weinberger v. Wisenfeld*, ... U.S. ...., 95 S.Ct. 1225, 1233, n.16 (1975). "But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Id.*, 95 S.Ct. at 1233. The City's abstract statement of its governmental interests must yield to a concrete analysis of the interests underlying these ordinances as revealed by the record in this case.

Respondents contend that an examination of the record herein establishes at best an interest in restricting unpopular speech deemed offensive by residents and businessmen on the basis of their unfounded and undifferentiated fears and apprehensions concerning the effect of adult theatres and bookstores on surrounding neighborhoods. At worst, the City's interest is no more than a naked desire to restrict by zoning sexually oriented expression that lies beyond the reach of the State's and City's criminal and civil obscenity laws.

2. Petitioners concede that "In enacting these ordinances much reliance was placed on the testimony of sociologist Dr. Mel Ravitz, Professor of Sociology, Wayne State University, and former President of the Common Council, City of Detroit (App. J, pp. 3-8)." (Pet. Br., p. 18). Ravitz's affidavit, together with the affidavits of Walsh and Stewart, are premised upon an alleged "basic sociological axiom":

> "if people believe something is true even if it is not originally, they will tend to act as if it were true and in so doing help produce the condition that was originally only believed. If residents of any neighborhood believe that the

> concentration of the proscribed uses damage the neighborhood they will act as if it were true and will seek to move away and allow in people with different standards; they will allow their property to decline, they will not engage in the full range of conservation attitudes and activities so necessary to the maintenance of a healthful residential neighborhood." (App. J, p. 5; Pets. Br., p. 19).

Ravitz nowhere contends that the "clustering" of adult theatres and bookstores in a neighborhood causes any demonstrable ill effects other than appearing "rightly or wrongly" as "symbols of decay and deterioration" (App. J, p. 6) which "leads people to believe the neighborhood is declining" (App. J, p. 5) and that "It matters not what the cause of this shaken confidence, whether it is a legitimate or phony cause." (App. J, p. 6).

The affidavit of William P. Walsh is in the same vein, alleging that the "clustering" of "regulated uses," including adult theatres and bookstores, causes nearby residents and businessmen to "anticipate" a decline in property values which "anticipation whether or not warranted in fact is sufficient to and does cause the property owners to flee the area" (App. J, p. 20); that adult bookstores and theatres "create in the minds of the adjacent residents and businessmen the same concern and hostility which is evoked upon the appearance of the other businesses classified as regulated uses." (App. J, p. 21).

The affidavit of Ogust Mai Stewart (App. J, p. 22) refers to her "shock, disgust and utter disbelief" at the "invasion" of "pornography businesses" in her

community (App. J, pp. 22-23). Stewart alleges, without the slightest factual support, that the impact of "these businesses" on a neighborhood consists of "the attraction of undesirable persons and the turning away of desirable potential buyers." (App. J, p. 24).

Petitioners admit (Br., pp. 18-19) that the ordinances were enacted upon the self-fulfilling prophesy theory espoused by Dr. Ravitz—that in the absence of proof that adult bookstores and theatres themselves cause neighborhood blight, the City should nevertheless stop them from "clustering" because they evoke in the minds of surrounding residents and businessmen an image of "decay and deterioration," causing "concern and hostility," "shock, disgust and utter disbelief," all of which "rightly or wrongly" causes the neighboring citizens to react to their own preconceived notions.

Whatever the extent of state power to regulate unprotected obscenity on the basis of "unprovable assumptions" concerning the effect of obscenity on the "quality of life," the "total community environment," and the "tone of commerce in the great city centers" (*Paris Adult Theatre I v. Slaton, supra,* 413 U.S. at 63, 58), this Court always has condemned state action restricting protected speech where the alleged state interest is the protection of a non-captive audience from unpopular, controversial or offensive speech and where the basis of the state action is nothing more than undifferentiated fear and apprehension.

Thus, even the very real fear that an audience may react violently to a speaker's controversial views is no justification for limiting his speech except where it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenberg v. Ohio, 395 U.S. 444 (1969).[4] This Court has condemned state efforts "selectively to shield the public from some kinds of speech on the ground that they are more offensive than others" except in the extremely limited instances when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. *Erznoznik v. City of Jacksonville, supra*, 95 S.Ct. at 2272-2273.

An asserted state interest in protecting a neighborhood from the exodus of residents offended by the action of a home owner in hanging an American flag with a peace symbol attached to it out of his window would not justify legislation precluding such activity. See, *Spence v. Washington*, ... U.S. ...., 94 S.Ct. 2727, 2731 (1974). Speech which is merely vulgar, offensive, or even repulsive is nonetheless protected. See, *e.g., Old Dominion, etc. v. Austin*, ... U.S. ...., 94 S.Ct. 2770, 2781 (1974) ["The most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth"]; *Louis v. City of New Orleans*, 415 U.S. 130, 134 (1974) [Conviction under overbroad ordinance for yelling at police officer "You god damn mother fucking police" reversed; "Vulgar or offensive" speech protected by First Amendment]; *Hess v. Indiana*, 414 U.S. 105 (1973) [Disorderly conduct conviction for stating "We'll take the fucking street later (or again)" spoken while facing

[4]In *Brandenberg*, the Court reversed the criminal conviction under Ohio's Criminal Syndicalism Statute of a Ku Klux Klan member who spoke at a Klan rally stating, among other things: "This is what we are going to do to the niggers"; "a dirty nigger"; "Send the Jews back to Israel"; "Bury the niggers"; "Nigger will have to fight for every inch he gets from now on." (395 U.S. at 446).

crowd at anti-war demonstration while sheriff and deputies were attempting to clear street reversed—words could not be punished either as obscene, as fighting words, as speech amounting to public nuisance in that privacy interests were being invaded, or as advocacy directed to inciting or producing imminent lawless action and likely to do so]; *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667, 670 (1973) [Expulsion of state university student for distributing "indecent" newspaper on campus not justified by any exception to First Amendment protection—"the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"]; *Gooding v. Wilson*, 405 U.S. 518, 527 (1972); *Cohen v. California*, 403 U.S. 15, 18-22 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949). Cf., *Procunier v. Martinez*, ... U.S. ...., 94 S.Ct. 1800, 1812 (1974) [Even substantial governmental interest in censoring prisoners' mail to preserve prison order and discipline, maintenance of security against escape or unauthorized entry, and rehabilitation of prisoners does not justify broad regulations authorizing censorship of statements that "unduly complain," "magnify grievances," express "inflamatory political, racial, religious or other views," and matter deemed "defamatory"].[5]

[5]Although the States lack power to restrict speech merely on the basis that some find it offensive, vulgar, or repulsive, the States undoubtedly have power to regulate the physical appearance of public buildings to prevent a tawdry or dilapidated condition which could contribute to neighborhood blight. The ordinances here, however, are not tailored to serve this interest.

3. Not only has the Court refused to recognize the legitimacy of state interests in protecting citizens from offensive, unpopular, or controversial speech, the Court also has condemned state action abridging First Amendment interests in pursuit of legitimate objectives but where the basis for the abridgment was mere undifferentiated fear and apprehension that adverse effects actually would occur. The Court has been particularly critical of restrictions on speech based upon predictions of adverse consequences thought likely to flow from a broad category of speech, as opposed to such judgments made on an individualized basis. Thus, in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court rejected the City's argument that, although it permits peaceful labor picketing near a school, it may prohibit all non-labor picketing "because, as a class, nonlabor picketing is more prone to produce violence than labor picketing." (408 U.S. at 100).

> "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. '[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.' Tinker v. Des Moines Independent Community School District, 393 U.S. at 508, 89 S.Ct. at 737." (408 U.S. at 100-101).

In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court reversed state convictions under a disturbing the peace statute arising out of a civil rights demonstration. The Court held that the statute, as construed and applied, allowed demonstrators to be punished merely for peacefully expressing unpopular views. The Court rejected the views of the trial judge who thought it was "inherently dangerous" and an "inherent breach of the peace" to bring 1,500 black persons into the predominantly white business district in the City of Baton Rouge, to congregate across the street from the courthouse, to sing songs with lines such as "black and white together" and to urge the 1,500 demonstrators to descend upon lunch counters and sit there until they are served (379 U.S. at 549-550). The Court also rejected the State's contention that the convictions should be sustained because of the fear expressed by some of the state witnesses that "violence was about to erupt" because of the demonstration. (379 U.S. at 550). The Court found these arguments untenable because

> "Here again, as in Edwards [v. South Carolina, 372 U.S. 229], this evidence 'showed no more than that the opinions which [the students] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.' [citation omitted]. Conceding this was so, the 'compelling answer * * * is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.' Watson v. City of Memphis, 373 U.S. 526, 535, 83 S.Ct. 1314, 1320, 10 L.Ed.2d 529." (379 U.S. at 551).

In rejecting the contentions of the State, the Court relied upon *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5, which held that the very function of free speech under our system of government is to invite dispute; that it may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger; that speech properly may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea; that there is no room under the First Amendment for "standardization of ideas" by "dominant political or community groups." Thus, in *Terminiello*, convictions under a breach of the peace statute were reversed because the trial judge charged that defendant's speech could be punished "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." (337 U.S. at 3).

By the same token, simply because "dominant community groups" have an unfounded fear that adult theatres and bookstores will blight a neighborhood is no justification for restricting the right of such businesses to locate in areas otherwise zoned for such commercial uses where sufficient partonage exists to sustain two or more such businesses. The fact, if it be a fact, that the mere presence of an adult bookstore or theatre in an area zoned to permit commercial establishments "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger" cannot justify restricting the entry of the theatre or bookstore. See also, *Healy v. James*,

408 U.S. 169, 189-190, 191 (1972) [Refusal of state college president to grant official campus recognition to local chapter of Students for a Democratic Society not justified by unsupported fear that group would cause disruption]; *Cohen v. California*, 403 U.S. 15, 23 (1971) [Fear that person wearing jacket bearing words "Fuck the Draft" "inherently likely to cause violent reaction" does not justify prohibiting such expression].

This Court also has held that where a legislative classification affects fundamental constitutional interests, the classification cannot be sustained upon the State's contention that because the public believes the classification is necessary, the State is entitled to act upon that belief. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court held that a one-year residency requirement in a county before persons became eligible to receive non-emergency care at county expense violated the equal protection clause because the classification penalized the fundamental constitutional interest in interstate mobility and the county failed to meet its heavy burden of showing a compelling state interest and the utilization of the least drastic means. The Court rejected the argument that "whether or not the durational residence requirement actually deters migration, the voters think that it protects them from low income families' being attracted by the county hospital; hence, the requirement is necessary for public support of that medical facility." (415 U.S. at 266-267).

Moreover, the Court has rejected legislative classifications based upon assumptions of fact which are little more than prejudices and stereotyped generaliza-

tions. In *Stanton v. Stanton*, ... U.S. ....., 95 S.Ct. 1373 (1975), the Court held that a state statute specifying for males a greater age of majority than for females in the context of parents' obligation for support payments for their children was a denial of equal protection even under the rational basis standard. The state court had held the classification justified by certain "old notions" concerning the respective roles of men and women in society. This Court rejected these "old notions," stating that it is unwilling to accept the "unquestioned truth" of these stereotypes. (95 S.Ct. at 1378).

Respondents contend, in short, that a State has no legitimate interest, much less a compelling or substantial interest, in restricting the location of adult theatres and bookstores merely because residents are offended by their mere presence, perceive them as "symbols of decay and deterioration," and believe, without basis in fact, that they lead to neighborhood blight. The States cannot whittle away First Amendment freedoms merely because some citizens, or even a majority, entertain preconceived but unproved beliefs so strongly held that they will act on the basis of such prejudices. If Government can restrict the locations available to adult theatres and bookstores on the basis of these interests, it can as easily provide that no more than two black persons may reside ("cluster") in an otherwise all-white neighborhood because the white residents believe, "rightly or wrongly," that an influx of black persons will cause neighborhood blight, and the white residents and businessmen will have their confidence in the neighborhood shaken, and will begin to move out or neglect their property, thus causing the initially

unfounded notions to become reality. The intolerable consequences of such reasoning was perceived by this Court in 1917 when it struck down as a denial of equal protection a city ordinance preventing the occupancy of a residence by a black person in any block where the majority of residents were white. *Buchanan v. Worley*, 245 U.S. 60.

In *Buchanan*, the City argued that the ordinance "tends to promote the public peace by preventing racial conflict," and "prevents the deterioration of property owned and occupied by white people, which deterioration . . . is sure to follow the occupancy of adjacent premises by persons of color." (245 U.S. at 73-74). The Court found these state interests insufficient:

> "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges." (245 U.S. at 80-81).

4. In its brief, the City urges another interest illegitimate on its face. The City states that this Court's decision in *Redrup v. New York*, 386 U.S. 767 (1967), and the decision of the Michigan Supreme Court in *People v. Bloss*, 388 Mich. 409 (1972) "opened the gates for a burgeoning business in 'adult' types of entertainment" and that the "entrepreneurs in pornography immediately took advantage of the situation" (Pets. Br., p. 19). The City contends that these zoning ordinances are necessary to limit the spread of adult

theatres and bookstores which the City is unable to control by means of its criminal and civil obscenity laws. Thus, the City states that "There remains the very real problem of controlling the influx of adult businesses whose stock in trade . . . are entitled to display and/or distribution before any judgment may be made as to whether the material offered is pornographic"; that "continued and repeated convictions for disseminating pornographic material will not close those business establishments which are the continuing, visible sources of material which is offensive to the neighboring business and residential community, whether or not the material has been legally determined to be pornographic." (Pets. Br., pp. 22-23).

The same argument was made in the District Court where the City contended that it "must take some kind of action. It cannot sit back and wait until this material is finally determined to be obscene or not"; that "Until these kinds of magazines are taken to court one by one, on a piecemeal basis, there is no way that we can stop the sale or dissemination of this kind of material." (App. L, pp. 48-49). Such a state interest in censoring undesirable films and books, which have not been declared obscene, in a way which makes resort to the criminal laws dealing with obscenity largely unnecessary is not a legitimate interest. It is, rather, nothing more than a desire to establish prior restraint on freedom of expression without the necessary procedural safeguards. See, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Southeastern Productions, Ltd. v. Conrad*, ... U.S. ...., 95 S.Ct. 1239 (1975).

C. Even if Detroit's Alleged Interest in Preventing the "Clustering" of Adult Theatres and Bookstores Together With Other "Regulated Uses" on the Basis of the Public's Undifferentiated Fears and Apprehensions Concerning Expression Deemed Offensive Could Be Considered a Legitimate State Interest, Such Interest Nevertheless Is Not Sufficiently Compelling or Substantial to Justify Discrimination Among Classes of Constitutionally Protected Expression Solely on the Basis of Content.

1. Governmental action which imposes restrictions or burdens on selected classes of expression on the basis of its content or message is the essence of censorship forbidden by constitutional principles of equal protection and freedom of speech and press. "The right to use a public place for expressive activity may be restricted only for weighty reasons. . . . Clearly, Government has no power to restrict such activity because of its message." *Grayned v. City of Rockford* 408 U.S. 104, 115 (1972). In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court held violative of the equal protection clause an ordinance which prohibited all forms of peaceful picketing within 150 feet of any primary or secondary school building but permitted peaceful labor picketing within 150 feet of the school. The fact that nonlabor picketing still could be conducted across the street from the school (408 U.S. at 93, n.1) did not save the ordinance. The Court stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [citations omitted]." (408 U.S. at 95).

> "The essence of this forbidden censorship is content control. Any restriction on expressive activity

> because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Company v. Sullivan, supra, 376 U.S. at 270, 84 S.Ct. at 721." (408 U.S. at 96).

The Court stated that both under the equal protection clause and the First Amendment "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." (408 U.S. at 96). The Court noted that it has frequently condemned such discrimination among different users of the same medium for expression in such cases as *Niemotko v. Maryland*, 340 U.S. 268 (1951) and *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Similarly, the Court observed that in its many decisions condemning licensing schemes lodging broad discretion in public officials to grant or deny permits for speech-related activity, the vice of the licensing schemes was their potential use as instruments for selectively suppressing unpopular points of view. See, cases cited at 408 U.S. 97.

In *Mosley*, as in the present case, the ordinance itself described restricted speech-related activity "not in terms of time, place, and manner, but in terms of subject matter." Such an ordinance " 'thus slip[s] from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted." (408 U.S. at 99).

In *Miami Herald Publishing Company v. Tornillo*, ... U.S. ...., 94 S.Ct. 2831 (1974), the Court held that a state statute requiring a newspaper which assails the character of a political candidate to afford free space to the candidate for reply violates the First Amendment. The Court stated that the decisions of a newspaper concerning its content constitute the exercise of editorial control and judgment, and "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." (94 S.Ct. at 2840). Mr. Justice White, concurring, stated that "A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed." (94 S.Ct. at 2840).

In *Pell v. Procunier*, ... U.S. ...., 94 S.Ct. 2800 (1974), the Court upheld a prison regulation barring media representatives from personally interviewing selected inmates and preventing prisoners from initiating press interviews, noting that "This is not a case in which the selection [of persons who are permitted to visit prisoners] is based on the anticipated content of the communication between the inmate and the prospective visitor." (94 S.Ct. at 2805). The Court stated that "So long as this restriction operates in a neutral fashion, without regard to the content of the expression, it falls within the 'appropriate rules and regulations' to which 'prisoners necessarily are subject.' . . . ." (94 S.Ct. at 2807).

In *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667 (1973), the Court held imper-

missible under the First Amendment the expulsion of a state university student for distributing an "indecent" newspaper on campus where the expulsion was based on "the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution."

> "Since the First Amendment leaves no room for the operation of the dual standard in the academic community with respect to the content of speech, and because the state university's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed." (410 U.S. at 670-671) (Emphasis in original).

See also, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 510-511 (1969) [Public school authorities impermissibly singled out only black armbands worn as anti-war symbols for prohibition and not all symbols of political or controversial significance]: *Bigelow v. Virginia*, ... U.S. ...., 95 S.Ct. 2222, 2237 (1975) (Rehnquist, J., dissenting) [". . . we have always refused to distinguish for First Amendment purposes on the basis of content. . . ."].

In *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268 (1975), the Court held a city ordinance prohibiting the showing of films containing nudity in drive-in theatres when the screen is visible from a public street or place abridged the exercise of freedom of speech. The ordinance "discriminates among movies solely on the basis of content." (95 S.Ct. at 2273).

The Court condemned the City's attempt "selectively to shield the public from some kinds of speech on the ground that they are more offensive than others," citing *Police Department of Chicago v. Mosley, supra*, 95 S.Ct. at 2272. The Court noted that the only instances in which such "selective restrictions" have been upheld were when the speaker intrudes on the privacy of the home (*Rowan v. Post Office Department*, 397 U.S. 728 (1970)), or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure (*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). (95 S.Ct. at 2272-2273). Absent these two "narrow circumstances" in which "'substantial privacy interests are being invaded in an essentially intolerable manner'" (*Cohen v. California*, 403 U.S. at 21), "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." (95 S.Ct. at 2273).

The principle that emerges from the foregoing decisions is that governmental discrimination among types of protected expression on the basis of the content of the expression, together with governmental attempts to influence the content of the media of communication, are forbidden under the equal protection clause and the First Amendment, save in the most narrow and exceptional cases. Plainly, the governmental interests asserted by Detroit in support of its discriminatory zoning ordinance, discussed above, are not the kind of compelling or substantial state interests which could justify such content-based classification.

2. Petitioners rely on *Lehman v. Shaker Heights*, 418 U.S. 298 (1974); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972) for the proposition that classifications of expresion on the basis of content have been held permissible. See, Brief for Petitioners, pp. 35-38, 52-53. Petitioners' reliance on these cases is totally misplaced. In *Lehman*, a city's policy refusing all political advertising in city buses while permitting commercial advertising was held to violate neither the First Amendment nor the equal protection clause. Four Justices joined the plurality opinion on the ground that the City's mere acceptance of innocuous commercial advertising did not create a public First Amendment forum on the city buses. Justice Douglas concurred on the ground that the petitioner, a political candidate, had no constitutional right to force his message upon a captive audience. The four Justices who dissented did so on the ground that by accepting commercial advertising, the City had established a public forum for the expression of speech and it followed that discrimination on the basis of content was impermissible. All members of the Court appeared to agree that once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based solely upon subject matter or content.

Petitioners' suggestion that neighbors of adult bookstores and theatres, whose contents are sold or exhibited

only to those wishing to purchase or view them, somehow constitute a captive audience (Pets. Br., pp. 35-36) is incomprehensible and finds no support in the decisions of this Court.

Grayned v. City of Rockford, supra, not only offers no support for Petitioners' proposition that discrimination on the basis of content is permitted, but in fact condemns content-based classifications. See, 408 U.S. at 113, 115. Similarly, *Cox v. Louisiana, supra*, condemned discrimination on the basis of content, stating that Government cannot have discretion "to pick and choose among expressions of view" those which will be permitted and those which will not (379 U.S. at 569). The state statute upheld in *Cox v. Louisiana* prohibited all picketing, regardless of message or content, in or near a courthouse with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness or court officer in discharge of his duty. In *Cox v. New Hampshire, supra*, the Court merely upheld as a neutral, nondiscriminatory time, place and manner regulation, a state statute prohibiting all parades upon a public street, regardless of message or content, without a license. As construed by the state court, the statute precluded undue discrimination in granting or refusing licenses and prohibited "unfair discrimination" in the grant or denial of licenses (312 U.S. at 575-576).

D. Even if the Interests Asserted by Detroit as the Goals of the Zoning Ordinances Classifying Protected Speech on the Basis of Content Could Be Deemed Compelling or Substantial, Detroit Has Failed to Sustain Its Heavy Burden of Proving Such Classification Necessary to Achieve the Alleged Interests; the Means Selected Are Not Narrowly Tailored to Achieve the Objectives.

1. On the record in this case, Detroit has failed to sustain its heavy burden of proving that theatres and bookstores which sell and exhibit books, magazines and films dealing with sex and nudity will, if "clustered" with other "regulated uses," cause neighborhood blight and deterioration. The affidavits and exhibits submitted by the City in the District Court contain nothing more than sweeping generalizations plainly based on the adverse consequences of concentrations of the "regulated uses" other than adult theatres and bookstores. None of the affidavits or exhibits contain any particularized showing that adult theatres and bookstores, as distinguished from flop houses, bars, pawnshops and the like, contribute in any manner whatsoever to the deterioration of surrounding neighborhoods. Thus, in the affidavit principally relied upon by Petitioners, that of Mel Ravitz, there is no specific discussion of the adverse effects, if any, caused by adult bookstores and theatres. On the contrary, Ravitz's analysis is general, speaking without differentiation of adult bookstores and theatres, taxi-dance halls, topless cabarets, shoeshine parlors, and the other "regulated uses" as a single category (See, pp. 10-11). The affidavit of Walsh is no different (See, pp. 11-12, *supra*).

The affidavit of Stewart fails to state any facts showing an adverse impact of adult theatres and bookstores on a surrounding neighborhood, other than those alleged to flow from the mere apprehensions and hostility of surrounding residents (See, p. 13, *supra*). The affidavit of Canevaro contains the same kind of undifferentiated analysis as in the Ravitz and Walsh affidavits. There is no specific discussion regarding the effects, if any, of adult bookstores and theatres upon the surrounding neighborhood (See, pp. 16-19, *supra*). The affidavit of Sheehy which is concerned only with Manhattan, New York deals primarily with the adverse effects of massage parlors and prostitution hotels, and states no facts to show that adult bookstores and theatres are themselves the cause of any social problems (See, p. 15, *supra*).

When a city attempts to impose restrictions upon a particular class of constitutionally protected speech solely on the basis of its content, its burden of proving that the classification is necessary to achieve a compelling state interest cannot be discharged by generalized statements of opinion such as Detroit has submitted here. Since Detroit's classification is subject to strict judicial scrutiny, the City cannot rely on any presumption of validity, but must carry a heavy burden of justification. See, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973). Detroit has not sustained its burden on the present record. See, *Healy v. James*, 408 U.S. 169, 189-190 (1972) [". . . if there were an evidential basis to support

the conclusion that [the group seeking campus recognition] posed a substantial threat of material disruption," the college would be justified in refusing recognition—"The record, however, offers no substantial basis for that conclusion."].[6]

Not only is there no evidentiary basis to support Detroit's assertion that adult theatres and bookstores contribute to neighborhood blight, but empirical research funded and directed by the Commission on Obscenity and Pornography suggests the absence of the alleged causal relationship. The Commission was established by the United States Congress as a result of Public Law 90-100. One of its tasks was to ascertain the methods employed in the distribution of sexually explicit materials and to explore the nature and volume of traffic in such materials. Report of the Commission on Obscenity and Pornography, Government Printing Office, 1970, page 73 (hereinafter referred to as "Report"). The Commission initiated a program of research designed to provide empirical information relevant to its tasks (Report, p. 2). Empirical studies of the patrons of adult bookstores and theatres, through observation and interviews with patrons and with bookstore and theatre owners and employees, were undertaken in cities throughout the United States, including Detroit (Report, p. 129). The Report contained the following findings:

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[6]Compare the evidentiary findings supporting the regulations upheld in *California v. La Rue*, 409 U.S. 109, 111 (1972) with the meager record herein. Moreover, in *La Rue* unlike the present case "the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals." (409 U.S. at 114). In *La Rue*, the Court also recognized broader state power to regulate "the commission of public acts that may themselves violate valid penal statutes" as opposed to printed or filmed expression (409 U.S. at 117).

(a) "The profile of the patron of adult bookstores that emerges from these observations in different parts of the United States is: White, middle aged, middle class, married, male, dressed in business suit or near casual attire, shopping alone." (Report, p. 129).

(b) "Patrons of adult movie theatres may be characterized on the basis of these observations to be predominantly white, middle class, middle aged, married, males, who attend alone." (Report, p. 131).

(c) "Very few juveniles were observed looking at the displays outside the theatre." (Report, p. 130).

(d) ". . . customers of adult movie theatres manifest a good deal of upward socioeconomic mobility." (Report, pp. 133-134).

(e) One study consisted of intensive interviews with customers of adult bookstores and theatres contrasted to similar interviews with a control group. Results: "The two groups are fairly similar in terms of a variety of demographic variations except that the consumers of erotic materials are better educated and have higher level current occupations." (Report, p. 134).

(f) From the same study referred to in the preceding paragraph: "Activities most frowned upon by our society, such as sadomasochism, pedophilia, bestiality, and non-consensual sex, are also outside the scope of their interests [referring to customers of adult bookstores and theatres]." (Report, p. 134).

The foregoing findings of the Commission afford no empirical basis for the assertion that adult theatres and bookstores attract "undesirables" into a neighborhood so as to cause any legitimate concern on the part of neighboring residents or businessmen.

2. In addition to the lack of factual support for Detroit's contention that adult theatres and bookstores cause neighborhood decay, the City's classification of "regulated uses" is both under-inclusive and over-inclusive. See, *Jiminez v. Weinberger*, ... U.S. ....., 94 S.Ct. 2496 (1974) [under rational basis-equal protection test, classification both under-inclusive and over-inclusive fails rationally to serve any legitimate state interest].

When Dr. Ravitz submitted his letter to the corporation counsel in 1962, which letter is nearly identical to his 1973 affidavit, he stated in reference to the original classification of "regulated uses," not including adult theatres and bookstores, the following: "They certainly are not the only such uses that should be controlled; all-night movies, burlesque shows, drive-ins, etc., also must be controlled, because they, too, have the same undesirable image." (App. J, p. 11). Yet, not only did the 1972 amendment to the "Anti-Skid Row Ordinance" fail to include all-night movies and drive-in theatres in the category of "regulated uses," but Dr. Ravitz's 1973 affidavit conspicuously omitted the language quoted above. The all-night movie advertising three or four general release (non-sexually oriented) features for a discount price is a common phenomenon in blighted downtown urban areas. Because it remains open all night and charges a low admission price, it tends to attract transients looking for some place to spend the night. The all-night movie is distinguished by its operational characteristics, not by the content of the films exhibited. Yet it is not included in the "skid row" category. Drive-in theatres, also identified by Dr. Ravitz as a use which should be restricted,

were not included in the 1972 amendments. Drive-in theatres also are distinguished, not by the content of the films exhibits, but by their operational characteristics.

Similarly, massage parlors and other commercial establishments with a potential for becoming places of prostitution, were not included in the category of "skid row" uses, although massage parlors are prominent in the affidavit of Gail Sheehy submitted by Petitioners in the District Court. In addition, mission churches and rescue missions identified in the Canevaro affidavit as typically "skid row" uses are not included in the ordinance. Surely, low-priced all-night movies, mission churches, rescue missions and massage parlors are far more characteristic of deteriorating neighborhoods than are adult theatres and bookstores.

The zoning ordinance is over-inclusive as well. As discussed earlier, the City made no particularized showing to justify lumping adult theatres and bookstores together with topless cabarets,[7] pawnshops, flop houses, bars, shoeshine parlors, secondhand stores, and motels. Thus, even if the theory of the original Anti-Skid Row Ordinance is correct regarding the adverse effects of the "clustering" of uses with skid row images, Detroit has made no showing that adult theatres and bookstores properly belong in this category.

3. An additional interest is asserted by Detroit as underlying its classification. This additional interest

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[7]Compare *California v. La Rue*, 409 U.S. 109 (1972) with *Doran v. Salem Inn, Inc.*, ... U.S. ...., 95 S.Ct. 2561 (1975) [District Court did not abuse discretion in preliminarily enjoining enforcement of town ordinance prohibiting topless dancing—topless dancing can be speech entitled to First and

(This footnote is continued on next page)

appears in the City's Brief although it was not urged in the District Court and finds no support in the record. Thus, Petitioners suggest that the ordinances are intended "to protect and preserve residential zoning districts . . . with the intent of providing a suitable atmosphere for family living, and a suitable atmosphere to raise children." (Pets. Br., p. 21). But the prohibition against more than two "regulated uses" within 1,000 feet of a proposed location plainly was not designed to protect residential neighborhoods. The 1,000 foot provision is superimposed upon the City's basic zoning scheme dividing the City into areas zoned for residential, commercial, and industriai uses. Adult theatres and bookstores, like other commercial uses are not permitted in areas zoned exclusively for residential purposes, independent of the provisions of the "Anti-Skid Row" Ordinance.

The City's asserted interest in "protecting" residentially zoned districts from adult theatres and bookstores appears to refer instead to the recently amended ordinance prohibiting the location of adult theatres and bookstores within 500 feet of any residentially zoned district (App. I). The predecessor to this ordinance prohibited the location of adult theatres and bookstores within 500 feet of any residential unit, was declared unconstitutional by the District Court, and the City failed to appeal. The amended provision was not before the District Court nor the Court of Appeals, and is not before this Court. Of necessity, no record was made before the District Court with respect

Fourteenth Amendment protection—*La Rue* does not justify prohibition of topless dancing not confined to bars serving alcoholic beverages as part of a liquor licensing program].

to the new provisions.[8] In any event, the 500 foot provision is subject to all of the infirmities outlined in Points I and II of this Brief. In particular, Detroit has made no factual showing that adult theatres and bookstores contribute to neighborhood blight or cause any other adverse consequence when located within 500 feet from a residential zone. Many streets zoned for commercial purposes are located within 500 feet of residentially zoned districts in order to serve conveniently the needs of the adjacent residential district.[9]

E. To the Extent That Any Legislation Is Necessary to Promote a Compelling State Interest in Preventing Adult Theatres and Bookstores From Contributing to Neighborhood Blight, Less Drastic Means Are Available Which Do Not Broadly Stifle First Amendment Interests.

Respondents have argued that Detroit has no legitimate interest in limiting the locations available for adult theatres and bookstores simply to shield the public from a class of speech deemed offensive where the public's alleged fear of adult theatres and bookstores' contributing to neighborhood blight is based on nothing more than unsupported prejudices. Aside from the

[8]Petitioners appear to press for a ruling on the new 500 foot provision although it is not properly presented for review. See, *Cousins v. Wigoda*, ... U.S. ...., 95 S.Ct. 541, 551, n.1 (Rehnquist, J., concurring): "Gratuitous observations are particularly inappropriate in this area where the Court has long eschewed passing on issues not required for resolution of the case presented."

[9]To the extent that the City may be asserting an interest in protecting children from sexually oriented material, it is plain that the 1,000 foot provision is not directed toward this objective and is fatally overbroad if justified as necessary to protect children. See, *Butler v. Michigan*, 352 U.S. 380; *Erznoznik v. City of Jacksonville, supra*, 95 S.Ct. at 2274-2275.

content of expression sold or exhibited in theatres and bookstores, there are physical and operational characteristics of these and any other commercial establishments which may contribute to the appearance of neighborhood blight and resulting actual deterioration. Thus, the all-night movie, previously discussed, can be a factor contributing to a skid row atmosphere. Legislation limiting such businesses' hours of operation is a solution narrowly tailored to the nondiscriminatory state interest.

Similarly, the affidavit of Stewart objects to a "two block strip . . . ablaze with multi-colored expensive neon signs" (App. J, p. 23). Legislation with the aesthetic goal of preventing neon jungles can be enacted without discriminating against any particular class of expression. In addition, legislation aimed at improving the physical condition and appearance of dilapidated public buildings can help prevent a skid row appearance without discriminating against any class of protected speech. Further, large outdoor signs with stationery images offensive to passersby who cannot, as a practical matter, avoid exposure are no doubt subject to some regulation, although the extent of state power in this regard is not here presented. See, *Erznoznik v. City of Jacksonville, supra*, 95 S.Ct. at 2272-2274.

Finally, whether or not adult theatres and bookstores are able to "cluster" in any given area ultimately depends upon the public's willingness to patronize the businesses. An adult theatre or bookstore, no less than any other business, depends upon the financial support of the public for its continued existence. In a free society, the ability of the public to withhold its support from obnoxious ideas and expression is all the "protection" necessary.

II.

The Detroit Ordinances, 742-G and 743-G, Which Limit Severely the Locations Available Within the City for the Establishment of "Adult" Theatres and Bookstores Violate the Free Speech and Press Provisions of the First and Fourteenth Amendments Because the Ordinances Directly Abridge Protected Expression and, Alternatively, Even if Viewed as a Regulation of Non-Speech Elements in a Course of Conduct Which Incidentally Limits First Amendment Interests, the Ordinances Fail to Further a Compelling, Important or Substantial Governmental Interest, Fail to Serve Any Governmental Interest Unrelated to the Suppression of Free Expression, and Restrict the Exercise of First Amendment Freedoms in a Manner Far Greater Than Essential to the Furtherance of Any Legitimate Governmental Interest.

Respondents' analysis of the Detroit ordinances as violative of the freedoms of speech and press guaranteed by the First and Fourteenth Amendments, necessarily overlaps the previous analysis under the equal protection clause of the Fourteenth Amendment. Accordingly, Respondents will refer to portions of the discussion contained in Point I, *supra*, where appropriate, in the interest of avoiding unnecessary repetition.

As noted earlier, Detroit concedes that the zoning ordinances affect First Amendment interests, classify protected expression on the basis of its content, and thus must be shown necessary to promote a compelling state interest and must not broadly stifle individual liberties when the end can be more narrowly achieved. The City nevertheless seeks to support this

content-based limitation on First Amendment interests on the basis of several theories, discussed hereafter.

Before discussing Detroit's attempts to fit this restriction of First Amendment rights into one of the narrow categories heretofore recognized by this Court, two themes appear throughout the City's Brief which require comment.

A. State Power to Restrict First Amendment Interests Is No Greater Because Exercised in the Name of "Zoning."

The mere fact that the States have broad power to enact zoning regulations in the interests of public health, safety and welfare does not mean that this power can be exercised in a manner which abridges First Amendment interests. It is the "character of the right, not of the limitation," which governs the standard of judicial review. *Thomas v. Collins*, 323 U.S. 515, 530 (1945). Zoning, like libel, insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the represssion of expression that have been challenged in this Court, "can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).[10]

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[10]Compare, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) with *Gooding v. Wilson*, 405 U.S. 518 (1972); *Hess v. Indiana*, 414 U.S. 105 (1973), and *Louis v. City of New Orleans*, 415 U.S. 130 (1974) [Fighting words]; Compare *Valentine v. Chrestensen*, 316 U.S. 52 (1942) with *Bigelow v. Virginia*, ... U.S. ...., 95 S.Ct. 2222 (1975) [Commercial advertising]. See also, *Cox Broadcasting Corporation v. Cohn*, ... U.S. ...., 95 S.Ct. 1029 (1975) [Label of "invasion of privacy" does not alone warrant limitation of First Amendment

Because Detroit's exercise of its zoning power concededly restricts the exercise of First Amendment rights, the ordinances must measure up to strict standards of judicial review applicable where legislation affects First Amendment interests. Thus, a "mere showing of a legitimate state interest" will not suffice to justify the ordinances for even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone, and the least drastic means of satisfying even legitimate interests must be selected. *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973). The interest of the State in limiting First Amendment interests must be compelling. *Cousins v. Wigoda*, ... U.S. ...., 95 S.Ct. 541, 548, 549 (1975).

Accordingly, state interests and choices of means which might suffice to uphold legislation not affecting fundamental constitutional rights nevertheless may not survive the strict scrutiny required where, as here, such rights are affected. Contrast, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

B. The Ordinances Cannot Survive a First Amendment Challenge Merely Because They Restrict, but Do Not Altogether Prohibit, the Locations Available for the Establishment of "Adult" Theatres and Bookstores.

Throughout Petitioners' Brief, it is suggested that a less critical standard of review should be applied because the ability of adult theatres and bookstores

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rights]; *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268 (1975) [Protection of alleged "captive audience" theory did not justify ordinance restricting First Amendment interests].

to locate within the City of Detroit is not absolutely prohibited. See *e.g.*, Brief for Petitioners, pp. 14, 23, 33, 55. It is urged that the ordinances only "regulate," and do not prohibit. But this Court always has adhered to the admonition in *Hague v. CIO*, 307 U.S. 496, 516, that First Amendment freedoms "must not, in the guise of regulation, be abridged or denied."

Thus, in *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268 (1975), it was suggested that since drive-in theatres could construct barriers to shield their screens from passersby, the ordinance did not preclude drive-in theatres from exhibiting films containing nudity. The Court pointed out, however, that the erection of such barriers would impose a cost that could deter drive-ins from exhibiting constitutionally protected films, and that "Such a deterrent, although it might not result in total suppression of these movies, is a restraint on free expression. See, *Speiser v. Randall*, 357 U.S. 513, 518-519. . . ." (95 S.Ct. at 2274, n.8).

In *Southeastern Promotions, Ltd. v. Conrad*, ... U.S. ...., 95 S.Ct. 1239 (1975), the city sought to justify its refusal to lease the municipal auditorium to the producers of the stage play "Hair" on the ground that the play could be produced in a privately owned theatre in the city. The Court rejected this argument, stating that even if a privately owned forum was available, "that fact alone would not justify an otherwise impermissible prior restraint." (95 S.Ct. at 1245). The Court quoted the statement in *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939), that "One is not to have the exercise of his liberty of expression in appropriate places abridged on the

plea that it may be exercised in some other place." The Court in *Southeastern Promotions* concluded that "It does not matter . . . that the Board's decision might not have had the effect of total suppression of the musical in the community." (95 S.Ct. at 1245). The Court pointed to the decisions in *Interstate Circuit v. Dallas*, 390 U.S. 676, 688 (1968) and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). In *Interstate*, a licensing scheme was held to violate the First Amendment even though its "regulation of expression" was "one of classification rather than direct suppression." And in *Bantam Books*, a state system of "informal censorship" without direct regulatory or suppressing functions was nevertheless held to violate the First Amendment.

In *Miami Herald Publishing Company v. Tornillo*, ... U.S. ...., 94 S.Ct. 2831 (1974), the State argued that its right-to-reply statute did not amount to a restriction of the newspaper's freedom of expression because "the statute in question here has not prevented the Miami Herald from saying anything it wished." The Court held that this argument begged the question. Noting that "Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers," the Court concluded that "The Florida statute exacts a penalty on the basis of the content of the newspaper." (94 S.Ct. at 2839). In the first place, the Court deemed significant the penalty resulting from the compelled printing of a reply in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to

print. Faced with such costs, the newspaper might well be deterred from vigorous political and electoral coverage (94 S.Ct. at 2839). But even if the right-to-reply statute imposed no actual costs or deterrents, the statute nevertheless violates the First Amendment because it seeks to influence a newspaper's exercise of editorial control and judgment, and this is a direct abridgment of First Amendment rights (94 S.Ct. at 2839-2840).

In *Spence v. Washington*, ... U.S. ...., 94 S.Ct. 2727 (1974), the Court reversed a conviction under a state flag desecration statute based upon the appellant's display of an American flag with a peace symbol attached. The State Supreme Court, in affirming the conviction, had found the inhibition on appellant's freedom of expression "minuscule and trifling" because there were "thousands of other means available to [him] for the dissemination of his personal views." This Court held that such an argument "must be rejected summarily." (94 S.Ct. at 2731, n.4). The Court concluded that appellant had engaged in a form of protected expression and could not be penalized therefor.

In *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court stated that any "significant interference" with First Amendment interests, although not amounting to total prohibition, must be subjected to strict judicial scrutiny. In *Kusper*, the Court held the First Amendment right of political association was infringed by a state statute prohibiting a person from voting at a party primary if he had voted at the primary of another political party within the preceding 23 months.

The Court rejected the contention that the 23-month rule did not deprive persons of all opportunities to associate with the political party of their choice.

> "But neither did the State attempts to compel disclosure of NAACP membership lists in Bates v. Little Rock and NAACP v. Alabama work a total restriction upon the freedom of the organizations' members to associate with each other. Rather, the Court found in those cases that the statutes under attack constituted a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association.
>
> "The same is true of [the statute in question]." (414 U.S. at 58).

In *Healy v. James*, 408 U.S. 169 (1972), the Court held that a state college president's denial of official campus recognition to the applicant, a local chapter of Students for a Democratic Society, violated the First Amendment. The State argued that the denial of campus recognition was an insubstantial interference with the First Amendment right of association; that the group was denied nothing more than the "administrative seal of official college respectability"; that the group still could meet as a group off campus, still could distribute written material off campus, and still could meet together informally on campus, as individuals (408 U.S. at 182-183). Nevertheless, the Court found impediments to freedom of association flowing from non-recognition in the denial of the use of campus facilities for meetings and other purposes, and a denial of the use of campus bulletin boards and the school

newspaper. "Such impediments cannot be viewed as insubstantial." (408 U.S. at 182).

In *Healy*, the Court stated that "The Constitution's protection is not limited to direct interference with fundamental rights. . . . We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.' Bates v. City of Little Rock, 361 U.S. 516, 523. . . ."(408 U.S. at 183).

In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), the ordinance prohibiting nonlabor picketing within 150 feet of any primary or secondary school was not saved merely because such picketing still could be conducted across the street from the school (408 U.S. at 93, n.1).[11] See also, *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

In view of the foregoing, Detroit cannot sustain the validity of its ordinances against First Amendment challenge merely by labelling them a "regulation" and not a prohibition. Regardless of the label, the ordinances impose a significant interference with the First Amendment interests of Respondents, other persons similarly situated, and the public generally. In the first place, the 1,000 foot limitation does not apply merely to

[11]In *Pell v. Procunier*, ... U.S. ...., 94 S.Ct. 2800 (1974), the Court upheld against a First Amendment attack prison regulations barring certain interviews between prisoners and the press, relying in part on alternative avenues of communication between prison inmates and persons outside. But the Court cautioned that "We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public." (94 S.Ct. at 2805).

preclude the location of more than two adult theatres and bookstores within 1,000 feet, but prohibits the location of an adult bookstore or theatre if there are already two or more of any of the "regulated uses" within 1,000 feet of the proposed location. Thus, if an adult theatre proposes to locate on a city block in which a motel and bar already are located, the adult theatre is excluded. Similarly, if a shoeshine parlor and pawnshop are already on the block, an adult bookstore is excluded. Indeed, even if an established non-adult bookstore wishes to open a section restricted to adults and featuring sexually oriented reading material, it cannot do so if two or more of the "regulated uses" already are in existence within 1,000 feet. The ordinances thus act to impose special restrictions on one particular class of constitutionally protected expression not applicable to all others. Similar to the ordinance struck down in *Erznoznik v. City of Jacksonville, supra*, the ordinances here may deter booksellers and theatre owners from disseminating the one form of speech subject to the special restrictions.

Moreover, to whatever extent adult theatres and bookstores do tend to locate close to one another, they do so presumably because a larger market of consumers thus becomes available. If it is true that the consumer of sexually oriented reading and viewing material prefers to shop in an area where several outlets are available, the restrictions contained in the ordinances impose an economic disadvantage on the proprietors of adult theatres and bookstores as well as a burden upon the consuming public. Plainly, "Such impediments cannot be viewed as insubstantial." *Healy v. James*, 408 U.S. 169, 182 (1972).

Finally, just as the right-to-reply statute condemned in *Miami Herald Publishing Company v. Tornillo,* ..... U.S. ....., 94 S.Ct. 2831 (1974), the ordinances here constitute an attempt by Government to influence and control the "editorial" judgment of proprietors and prospective proprietors of theatres and bookstores. This is flatly inconsistent with the command of the First Amendment.

C. The Ordinances Here Must Be Analyzed as a Direct Abridgment of First Amendment Interests, Not as a Regulation of Non-Speech Elements in a Course of Conduct Which Only Incidentally Limits First Amendment Interests.

1. Petitioners place their principal reliance on *United States v. O'Brien,* 391 U.S. 367 (1968), contending that the ordinances regulate conduct, have only an incidental effect on First Amendment interests, and thus may be upheld if the standards enunciated by the Court in *O'Brien* are satisfied. Respondents contend, on the contrary, that the ordinances in the present case do not fit the *O'Brien* mold.

In *O'Brien,* the statute proscribing destruction of draft cards did not abridge free speech on its face. The Court stated that the statute "on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct." (391 U.S. at 375). In the present case, the zoning ordinances on their face do abridge First Amendment rights by

directly limiting the locations available to theatres and bookstores whose content consists of "adult" but nonetheless constitutionally protected expression. Detroit's ordinances, with respect to adult theatres and bookstores, regulate no conduct independent of the content of the books, magazines, or films sold or exhibited.

2. If it can be said that the establishment of an adult theatre or bookstore in a particular location is "conduct," nevertheless both the objective and the operation of the ordinances is with the communicative aspect of the alleged conduct. In *O'Brien,* however, the governmental interest was to assure the continued availability of issued draft cards. The statute prohibited the conduct of mutilating draft cards and nothing more. "In other words, both the governmental interest and the operation of the [statute] are limited to the non-communicative aspect of O'Brien's conduct." (391 U.S. at 381-382). The Court in *O'Brien* thus found the case "unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." As an example, the Court cited *Stromberg v. California,* 283 U.S. 359 (1931), in which the Court struck down the statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." "Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of non-communicative

conduct. See also, NLRB v. Fruit and Vegetable Packers Union, 377 U.S. 58, 79, . . . (1964) (concurring opinion)." (391 U.S. at 382).

The governmental interests underlying the Detroit ordinances and the operation of the ordinances are analogous to *Stromberg*, and not to *O'Brien*. Here, Detroit's alleged interests arise because the communication allegedly integral to the conduct of establishing adult theatres and bookstores in a particular location is itself thought harmful. Detroit asserts that its citizens react adversely only to the presence of theatres and bookstores distinguished by the content of the materials sold or exhibited.

A statute which limits First Amendment interests on the basis of the content of expression never can be analyzed as a mere "incidental" restriction of free speech arising from governmental regulation of conduct intertwined with speech. See, *e.g.*, *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268, 2272-2274 (1975); *Cox Broadcasting Corporation v. Cohn*, ... U.S. ...., 95 S.Ct. 1029, 1046 (1975); *Miami Herald Publishing Company v. Tornillo*, ... U.S. ...., 94 S.Ct. 2831, 2839-2840 (1974); *Pell v. Procunier*, ... U.S. ...., 94 S.Ct. 2800, 2805, 2806, 2807 (1974); *Spence v. Washington*, ... U.S. ...., 94 S.Ct. 2727, 2730, 2732, n.8 (1974); *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667, 670-671 (1973); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cohen v. California*, 403 U.S. 15 (1971).

D. Even if the Ordinances Are Analyzed as an "Incidental" Limitation on Speech Resulting From Governmental Regulation of a Single Course of Conduct Involving Both Speech and Non-Speech Elements, the Ordinances Fail to Satisfy the O'Brien Tests.

In *United States v. O'Brien, supra,* 391 U.S. at 377, the Court stated:

> "[A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

1. The Detroit ordinances are not within the constitutional power of the Government; the interests principally asserted are not legitimate. Respondents contend that Detroit's interest in preventing the "clustering" of adult theatres and bookstores because of the public's undifferentiated fears and apprehensions concerning theatres and bookstores disseminating speech deemed offensive is not a legitimate state interest within the constitutional power of Government. See, the discussion and cases cited in I-B, *supra*, pp. 35-48.

2. The interests principally asserted by Detroit are not so important, substantial, or compelling as to justify a restriction on First Amendment rights based solely on content. Respondents here contend that even if Detroit's alleged interest in preventing the "clustering" of adult theatres and bookstores together with other "regulated uses" on the basis of the public's undiffer-

entiated fears and apprehensions concerning expression deemed offensive could be considered a legitimate interest, such interest nevertheless is insufficiently compelling or substantial to justify discrimination among classes of constitutionally protected expression solely on the basis of content. See, I-C, *supra*, pp. 49-55.

3. Even if Detroit's interests are legitimate and compelling, the means selected have not been shown necessary to achieve the objectives. Respondents contend that Detroit has failed to sustain its heavy burden of proving its content-based classification necessary to achieve the alleged interests. Moreover, the means selected are not narrowly tailored to achieve the objectives. See, I-D, *supra*, pp. 56-63.

4. The interests asserted by Detroit are not unrelated to the suppression of free expression. Respondents contend that the ordinances in the present case, unlike the statute in *O'Brien*, limit First Amendment interests on their face. See, II-C(1), *supra*, pp. 74-75. Respondents also contend that Detroit's alleged interests arise because the communication allegedly integral to the "conduct" of establishing adult theatres and bookstores in particular locations is itself thought harmful, and the state interests therefore are directly related to the restriction of First Amendment rights. See, II-C(2), *supra*, pp. 75-76.

5. Detroit's "incidental" restriction on First Amendment interests is greater than essential to the furtherance of its alleged interests. Respondents here contend that to the extent any legislation is necessary to promote an alleged compelling state interest in preventing adult theatres and bookstores from contributing to neighborhood blight, less drastic means are available which do not broadly stifle First Amendment interests. See, I-E, *supra*, pp. 63-64.

E. The Zoning Ordinances Cannot Be Upheld as Time, Place or Manner Regulations Because They Discriminate Against One Class of Expression on the Basis of Its Content.

Petitioners seek to uphold the ordinances herein by analogy to the decisions of this Court sustaining time, place or manner regulations of expressive activity. See, Brief for Petitioners, pp. 9, 37, 52-54. This attempt is unavailing because the Court consistently has held that valid time, place or manner regulations of speech must be neutral and cannot impose restraints on the basis of the content of expression. See, *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268, 2272 (1975) ["A state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content."]; *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667, 670-671 (1973) ["petitioner was expelled because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution."]; *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) ["the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. . . . This is never permitted."]. See also, *Pell v. Procunier*, ... U.S. ...., 94 S.Ct. 2800, 2805, 2806, 2807 (1974); *Adderley v. State of Florida*, 385 U.S. 39, 46-47 (1966); *Cox v. Louisiana*, 379 U.S. 559, 569 (1965); *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953); *Cox v. New Hampshire*, 312 U.S. 569, 575-576 (1941).

F. The Zoning Ordinances Cannot Be Upheld Under a Theory of Protecting a "Captive Audience."

Petitioners suggest for the first time in their Brief that the ordinances are intended to prevent adult theatres and bookstores from being thrust upon a "captive audience." See, Brief for Petitioners, pp. 35-36. This theory is totally without foundation. The ordinances do not regulate the manner in which adult theatres or bookstores may operate, but rather limit their ability to locate within a specified distance from other "regulated uses." The ordinances are not directed at any alleged thrusting of offensive communication upon persons unable to avoid exposure. See, *Erznoznik v. City of Jacksonville, supra,* 95 S.Ct. at 2272-2274. Nor is there here any issue of whether a public forum for First Amendment activity has been established. See, *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974).

G. The Zoning Ordinances Cannot Be Justified as a Governmental Effort to Protect Minors From Sexually Oriented Materials.

Petitioners also fleetingly suggest, for the first time, that protection of minors somehow underlies the ordinances. See, Brief for Petitioners, p. 21. However, the ordinances are not directed to preventing the establishment of adult theatres and bookstores in locations where children are likely to congregate.[12] Nor is the 1,000 foot provision in any way designed to "protect" exclusively residential neighborhoods. Plainly, the present ordinances do not reveal a limited and focused

[12]Whether such an ordinance could be sustained is a question not here presented.

state concern to shield juveniles from sexually explicit matter. See, *Erznoznik, supra,* 95 S.Ct. at 2274-2275.

H. The Waiver Provisions of §66.0101 Do Not Save the Ordinances Because the Commission's Authority to Waive the 1,000 Foot Provision Is Wholly Discretionary, Lacking Narrow and Definite Standards.

Section 66.0101 (App. G, p. 68) provides that the City Plan Commission "may waive" the 1,000 foot provision for adult bookstores, theatres and the other "regulated uses" if designated findings are made. The findings include that the proposed use "will not be contrary to the public interest"; that the "spirit and intent of this ordinance will be observed"; that the establishment of an additional regulated use in the area "will not be contrary to any program of neighborhood conservation"; and that "all applicable regulations of this ordinance will be observed." (App. G, p. 68).

Even if the Commission were required to waive the 1,000 foot provision if the designated findings are made, the standards contained in the waiver provision are so imprecise and indefinite as to permit the Commission virtually unbridled discretion to deny a waiver. Similar broad and indefinite standards in administrative licensing schemes affecting First Amendment rights frequently have been condemned by the Court. See, *Southeastern Promotions, Ltd. v. Conrad,* .... U.S. ...., 95 S.Ct. 1239, 1243-1245 (1975), and cases cited therein.

III.

Detroit Ordinance 743-G, Requiring Adult Theatres to Be Licensed by the Mayor but Permitting the Mayor to Refuse Such License on the Basis of Broad and Indefinite Standards, and Lacking Any Procedural Safeguards, Constitutes an Impermissible Prior Restraint of First Amendment Rights and Further Deprives Persons Desiring to Operate Adult Theatres of the Equal Protection of the Laws, Contrary to the First and Fourteenth Amendments.

Ordinance 743-G additionally requires adult theatres, but not adult bookstores or theatres generally, to be licensed by the Mayor, and provides that the Mayor may refuse to issue a license, and may revoke any license already issued,

> "upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this City regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." (App. G, p. 82).

In a long line of decisions, this Court consistently has struck down administrative schemes licensing the exercise of First Amendment activities in the absence of precise and clear standards. When officials are granted discretion to grant or deny licenses for speech-related activity on the basis of broad and indefinite standards, the potential for unbridled prior censorship

is too great to permit such schemes to stand. See, *Southeastern Promotions, Ltd. v. Conrad,* .... U.S. ...., 95 S.Ct. 1239, 1243-1245 (1975), and cases cited therein; *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 682-685 (1968), and cases cited therein. Detroit's licensing provision permits the Mayor to refuse to issue a license to an adult theatre if an "agent or employee" of the applicant has within the past two years violated any state criminal statute or any city ordinance "in any way relating" to the construction, use or operation of designated amusement businesses "which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." The alleged standards contained in the ordinance really are no standards at all. To permit a local official discretion to deny a license because any employee of the applicant has violated a city ordinance which, in the Mayor's opinion, "evidences a flagrant disregard" for public welfare, is to permit virtually unfettered prior censorship. See, *Cantwell v. Connecticut,* 310 U.S. 296, 305 (1940) ["He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion."]; *Hague v. CIO,* 307 U.S. 496, 516 (1939) [The official was empowered to refuse permit upon his opinion that he would thereby prevent "riots, disturbances or disorderly assemblage"]; *Gelling v. State of Texas,* 343 U.S. 960 (1952) ["of such character as to be prejudicial to the best interests of the people of said city"].

Detroit's licensing scheme for adult theatres is a system of prior restraint which "comes to this Court

bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad, supra,* 95 S.Ct. at 1246.

In addition, the licensing scheme fails to contain any of the procedural safeguards required by this Court where licensing schemes operate as a prior restraint. See, *Southeastern Promotions, Ltd. v. Conrad, supra,* 95 S.Ct. at 1247-1248; *Freedman v. Maryland,* 380 U.S. 51 (1965). Recognizing the procedural deficiencies of the scheme, Petitioners suggest that "the requirements of due process will be read into, or implied, in the law when necessary to protect the constitutional rights of the applicants." (Brief for Petitioners, p. 57). But the Michigan state courts have not construed these provisions to provide the necessary procedural safeguards, and this Court "lack[s] jurisdiction authoritatively to construe state legislation." See, *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 369 (1971); *Freedman v. Maryland, supra; Teitel Film Corp. v. Cusack,* 390 U.S. 139 (1968). Petitioners' suggestion that "time is not of the essence" to a person seeking a license to conduct a business (Brief, p. 58) plainly is incorrect. The First Amendment rights of a prospective proprietor of a theatre easily can be strangled to death by administrative delay in a licensing scheme. Indeed, the procedural safeguards enunciated in *Freedman* perhaps are even more necessary where the very existence of a theatre is at stake. See, *Burton v. Municipal Court,* 68 Cal.2d 684, 441 P.2d 281, 68 Cal.Rptr. 721 (1968); *Perrine v. Municipal Court,* 5 Cal.3d 656, 448 P.2d 648, Sup., 97 Cal.Rptr. 320 (1971).

In addition to the foregoing, Detroit not only has singled out "adult" theatres from all other theatres in imposing a license requirement, but it further has distinguished between adult theatres and adult bookstores, the latter not being required to be licensed. Yet the record contains not so much as a suggestion as to why only adult theatres need to be licensed any more than theatres generally, or why if the "adult" nature of the material is determinative, adult bookstores are exempted. Plainly, the singling out of adult theatres is an invidious discrimination in violation of the equal protection clause.

Conclusion.

For all of the foregoing reasons, the judgment of the Court of Appeals herein should be affirmed.

Respectfully submitted,

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MOTION FILED

JAN 6 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-312

ROMAN GRIBBS, Mayor of the City of Detroit, *et al.*,

Petitioners,

—v.—

AMERICAN MINI THEATRES, INC.,
A Michigan Corporation, *et al.*

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*, AND BRIEF *AMICI CURIAE*

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IN THE
SUPREME COURT OF THE UNITED STATES

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN FOR LEAVE TO FILE A BRIEF AMICI CURIAE

The American Civil Liberties Union and the American Civil Liberties Union of Michigan respectfully move for leave to file a brief amici curiae in the above-entitled case. The attorneys for Respondents

have consented to our request to file; the attorneys for Petitioners did not respond to our request.

We believe that the purpose of the zoning ordinances involved in this case is to suppress literature and films which are protected by the First Amendment. If zoning ordinances are thus to be used indirectly to defeat First Amendment rights, when direct suppression of those rights would be forbidden, municipalities will be armed with a weapon that they can indiscriminately utilize to suppress other forms of protected expression in addition to so-called "adult books" and "adult films." This scheme must be nipped in the bud lest it endanger a whole range of constitutionally protected rights. We believe our brief will assist the Court in resolution of the case.

It is therefore respectfully moved that leave be granted to file the attached brief.

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Attorney for Movants

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, AMICI CURIAE

INTEREST OF AMICI

The interest of amici curiae is set out in the preceding Motion for Leave to File.

STATEMENT OF THE CASE 1/

In 1969, there were located within the City of Detroit two "adult" bookstores, two "adult" theatres, and an insignificant number of "topless" cabarets. By mid-1972 the number of "adult" theatres had increased to eighteen, "adult" bookstores had increased to twenty-one, and "topless" cabarets numbered approximately seventy. Reports submitted to the Detroit City Council by the Police Department indicated that many of these "adult" businesses were clustering on main streets of the City (and Highland Park, a city within the City of Detroit), which were immediately adjacent to residential neighborhoods. Acting upon complaints of such neighborhood residents, the City Council enacted Ordinance 742-G, amending the Official Zoning Ordinance by including "adult" theatres and bookstores, and Class "D" (topless) cabarets in the category of "regulated uses." Regulated uses" were those uses determined from experience to have a deleterious effect on a neighborhood, and included taxi dance halls, bars, motels, pawnshops, etc. (Sec. 66.0000). Such uses were restricted in their location, i.e., no more than two "regulated uses" were to be permitted within 1,000 feet of each other. This prohibition could be waived by the City Plan Commission upon a showing that the proposed

1/ The Statement of the Case is taken from the Petition for Certiorari.

locations of the "regulated use" would not be injurious to the surrounding area. (Sec. 66.0101.)

In addition, Sec. 66.0103 of the Ordinance prohibited the location of an "adult" business within five hundred feet of a residential unit unless the prohibition was waived by the consent of fifty-one percent of the persons living or doing business within five hundred feet of the proposed location. 2/

Ordinance 743-G amended the Municipal Code to include "adult" theatres under Chapter 5, Article 2, entitled "Public Entertainment Generally" and required that they be licensed by the City.

Subsequent to the enactment of the above described ordinances on November 2, 1972, the Respondent Nortown Theatre, Inc.

2/ The District Court ruled thatthis provision was unconstitutional as it was more restrictive than necessary to achieve the City's legitimate governmental purpose. The Court stated that the ordinance, as written, protected a single residential unit, when the City continually asserted its purpose in enacting the ordinance was the protection of neighborhoods. In order to correct the "defect" noted by the District Court, the City amended Sec. 66.0103 to prohibit the location of "adult" businesses within five hundred feet of a "residentially zoned district." (See Ordinance 891-G, App I, pp. 84-92.)

began exhibiting films which were "adult," as defined in Sec. 32.0007 in an established theatre which was within 1,000feet of several other regulated uses and within five hundred feet of a residential area. The Respondents American Mini Theatre, Inc. and Pussy Cat Theatres, Inc., converted a corner gas station to a mini theatre and offered similar "adult" fare for exhibition. The newly renovated theatre was within 1,000 feet of two other regulated uses and within five hundred feet of a residential area. The Respondents were notified by the Petitioners of the City's intention to enjoin their operation under the State Zoning Enabling Act and the City zoning ordinances.

In the spring of 1973, following such notification, the Respondents claimed their constitutional rights under the First, Fifth, and Fourteenth Amendments were threatened by the proposed action of the various City officials, and sought declaratory and injunctive relief in the United States District Court, Eastern District of Michigan, under 42 USC 1983. The jurisdiction of the Court was invoked under 28 USC 1331 and 28 USC 1343(3).

The District Court consolidated the cases for argument and on March 22, 1974 issued a joint opinion which recognized the City's legitimate governmental purpose, and upheld the validity of the challenged ordinances with the exception noted in Footnote 2 above. Respondents appealed the decision to the Sixth Circuit Court of Appeals. On

June 16, 1975, the Court of Appeals, in a two to one decision, ruled that the ordinances were unconstitutional.

ARGUMENT

I

DETROIT'S ZONING AND LICENSING SCHEME FAILS TO DISTINGUISH BETWEEN UNPROTECTED CONDUCT AND PROTECTED EXPRESSION, AND IS THEREFORE OVERBROAD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

The City of Detroit urges that it can limit and control so-called "adult enterprises" because the ordinance at issue deals with conduct rather than speech, and is therefore not subject to the strict limitations of the First Amendment. To support that claim, it cites a list of cases and concludes that it has met the standards which justify governmental regulation as announced in United States v. O'Brien, 391 U.S. 367 (1968).

O'Brien, which upheld the constitutionality of legislation punishing the destruction and mutilation of draft cards, rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever a person engaging in the conduct intends thereby to express an idea." But draft card burning cannot analytically be compared to the exhibition of motion pictures or the sale of a magazine or book. In O'Brien it was conceded that the statute dealt only with conduct and was not facially defective. But here we are dealing with the distribution of books, magazines and

films to the general public, and there are a long line of cases that have held that these activities, unlike draft card burning, are a form of expression entitled to full First Amendment protections. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Jones v. Opelika, 316 U.S. 584, (1942); Marsh v. Alabama, 326 U.S. 501 (1946).

However, motion pictures are not absolutely immune from governmental interference or regulation. If obscene, they, like other modes of expression, fall outside of First Amendment protections. Miller v. California, 413 U.S. 15 (1973); United States v. Roth, 354 U.S. 476 (1957); Memoirs v. Mass., 383 413 (1963). But the City of Detroit does not contend that the purpose of this ordinance is to regulate only those things that stand outside of the First Amendment. It claims to be engaging in the legitimate governmental function of zoning to prevent the deterioration of neighborhoods and states that it can pursue that objective even if its regulations place incidental limitations on First Amendment freedoms. While "[m]ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, they are insufficient to justify such as diminishes the exercise of rights so vital" as freedom of speech. Schneider v. State, 308 U.S. 147 (1939). Rather, in order for the City of Detroit to restrict, impede, limit and control expression, it must show that the

expression is "used in such circumstances and of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that [the City] has a right to prevent." Schenck v. United States, 249 U.S. 47 (1919); Brandenberg v. Ohio, 395 U.S. 414 (1969).

When the City's ordinance is measured by this strong standard, it proves to be woefully inadequate. The City asserts that if a skid row atmosphere develops as in the 42nd Street district of Manhattan, there will be a "formidable increase in street crimes, prostitution and dope peddling, and a wide variety of other evils." 3/ These are precisely the same interests which have been asserted time and again as justification for laws banning frank discussions of sexual relationships, and which have been consistently rejected by this and other courts. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Butler v. Michigan, 352 U.S. 380 (1957); Winters v. New York, 333 U.S. 507 (1948); Louisiana v. Dayries, 187 F. Supp. 241 (D.C. La. 1960); and compare United States v. Two Obscene Books, 99 F. Supp. 760, with United States v. Roth, supra. The empirical link between sex-related entertainment and criminal activity popularly associated with such entertainment has never been proven, and recent investigations tend strongly to disprove it. See,

3/ Petitioner's Brief, pp. 20-21.

Report of the Commission on Obscenity and Pornography 27 (1972); Cairns, Paul and Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962). Even if such a link existed, it would not justify Detroit's attack on First Amendment freedoms, for its interest in controlling material dealing with sex is secondary. Primarily, its concern should be with controlling, restricting, limiting and preventing prostitution, drug abuse, rape and other anti-social acts, by punishing them under criminal statutes, rather than by punishing speech which is thought, even in the absence of evidence, to have some remote relationship to such acts.

The ordinances at issue attempt to define and regulate both the quality and quantity of the content of expression. In attempting to define the quality, by dividing it into two categories 4/ each with several sections, the ordinance regulates and affects speech in the sense forbidden by Burstyn and Erznoznik. The ordinance does not deal with unprotected speech, i.e., obscenity, but on the contrary, especially limits itself to a definition of content, which has been rejected as a definition of obscenity. Jenkins v. Georgia, 418 U.S. 153 (1974); Erznoznik v. City of Jackson-

4/ "Specified Sexual Activities" and "Specified Anatomical Areas."

ville, supra, Memoirs v. Massachusetts, supra; Grove Press v. Christianberry, 276 F. 2d 433 (2nd Cir. 1960); United States v. One Carton Positive Motion Picture Film, 367 F. 2d 889 (2nd Cir. 1966); United States v. A Motion Picture Film, 404 F. 2d 196 at 199 (2nd Cir. 1968); United States v. Goldstein, 73 F. Supp. 875 (D.C. N.J. 1947); Louisiana News v. Dayries, supra; Excelsior Pictures v. Chicago, 182 F. Supp. 400 (D.C. Ill. 1960); LeBaron v. Olesen, 125 F. Supp. 53 (D.C. Cal. 1954); Sunshine Book Company v. Summerfield, 128 F. Supp. 564 (D.C. D.C. 1955); P.B.I.C. v. Byrne, 313 F. Supp. 757 (D.C. Mass. 1970) stay denied 90 S. Ct. 1718. The portrayal of sexual activities or anatomical areas standing alone is not obscene. Miller v. California, supra; Jenkins v. Georgia, supra. However, it is precisely these non-obscene, constitutional acts and scenes which have been chosen by the City of Detroit to be restricted, controlled, zoned and licensed out of the City, rather than those contents which have been declared unprotected by the First Amendment. If the purpose of the ordinance is, as the City contends, to prevent the clustering of businesses which threaten to cause neighborhood deterioration, the City must tailor its zoning and licensing attack to apply only to those enterprises which have been found unworthy of constitutional protections because the content of their material, taken as a whole, has been considered to be without any serious literary, artistic, political or scientific value,

appeals to prurient interests, and depicts sexuality in a patently offensive manner. Miller v. California, supra. By failing that test, it is overbroad because it impermissibly affects protected content as well as unprotected content; Grayned v. City of Rockville, 408 U.S. 104 (1972); Shelton v. Tucker, 364 U.S. 479 (1960); N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964).

II

THE DETROIT ORDINANCES ARE AN INVALID SCHEME TO PROHIBIT EXPRESSION ADMITTEDLY ENTITLED TO FIRST AMENDMENT PROTECTION.

The City of Detroit contends that the ordinances at issue do not provide for "a blanket prohibition against the operation of adult businesses within its territorial limits," 5/ but the practical effect of the ordinance makes this statement untrue. Section 66.0103 of the ordinance provides:

> It shall be unlawful to hereafter establish an Adult Book Store, Adult Motion Picture Theater, Adult Mini Theater or Class 'D' Caberet within 500 feet of any residentially zoned district.

There is virtually no location within the

5/ Petitioner's Brief, pp. 2, 27.

territorial limits of the City of Detroit that is not "within 500 feet of any residentially zoned district," except perhaps Palmer Park or Belle Isle (which are not available for commercial development), the downtown area, and a few heavily industrialized areas. Therefore, what the City cannot do directly, it seeks to do indirectly by establishing conditions, rules and regulations making it impossible for "adult businesses" to be established. Thus, such "adult businesses" are not only subject to the 1000 foot limitation, but are also forbidden if within 500 feet of a residentially zoned district. The practical result of these limitations is to confine "adult businesses" to downtown Detroit.

The existence of a waiver provision in the ordinance does not cure its inherent defects. The fact that a majority of a community disapproves of such activity cannot justify suppression of First Amendment activities. The First Amendment was designed to protect minority rights from the tyranny of the majority. To claim that a movie theater or bookstore should not operate because the majority of the neighbors in that locale do not want it, destroys the purpose of the Bill of Rights. Freedom of expression is not dependent upon a plebiscite.

Using its powers of zoning and licensing as a facade, the City of Detroit has devised a scheme to prohibit what it admits

are legal and constitutional activities. On a previous occasion, the City adopted a zoning regulation designed to thwart blight and inhibit the deterioration of neighborhoods which, if applied to so-called "adult businesses," would not tend to prohibit legitimate, legal and constitutionally protected business. But by adopting a more restrictive scheme in 1972 which applies exclusively to adult business, the City has demonstrated that its motive was not to protect neighborhoods, but to drive constitutionally protected activities out of the City. The effect is the same as if the First Amendment were repealed in Detroit.

Zoning and licensing cannot be used as an instrument to invade the freedoms of speech or press. Those rights are the foundation upon which our free society rests; without them none of our other rights are secure. The true meaning of the First Amendment guarantees is that they are guarantees against the tyrannies of the majority --real or imagined. The purpose of the First Amendment is to guarantee that minority expression can exist. If in the name of zoning and licensing, Detroit can inhibit and prohibit sexual expression because it is deemed obnoxious to the majority, then Detroit and every other community, in the name of the power to zone and license can inhibit and prohibit expression of sexual matters that are deemed obnoxious to the majority, social matters deemed obnoxious to the majority, political matters deemed

obnoxious to the majority, religious matters deemed obnoxious to the majority, and economic matters deemed obnoxious to the majority. If that be true, then what use are those guarantees of freedom as contained in the Bill of Rights?

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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NORTOWN THEATRE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Motion Picture Association of America, Inc. hereby respectfully moves for leave to file as *amicus curiae* in these cases the Brief appended hereto. The consent of

counsel for Respondent Nortown Theatre, Inc. has been obtained by letter dated December 2, 1975, and the consent of counsel for Respondents American Mini Theatres, Inc. and Pussy Cat Theatres of Michigan, Inc. has been obtained by letter dated December 18, 1975. On December 2, 1975, movant wrote to counsel for Petitioners, who denied consent by letter dated December 4, 1975. (Copies of all four letters are being filed with the Clerk of this Court simultaneously with the filing of this Motion and appended Brief *amicus curiae*.)

Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and/or distributors of motion pictures in the United States, including:

Allied Artists Pictures Corporation
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation
Twentieth Century-Fox Film Corp.
United Artists Corporation
Universal Pictures, a division of
Universal City Studios, Inc.
Warner Bros. Inc.

The instant cases raise two questions which are of significance to the entire motion picture industry. These are: (1) the constitutionality of the specific Detroit ordinance under review, and (2) the general constitutional considerations which govern attempts to limit the exhibition of certain motion pictures to certain locales by means of what is commonly referred to as "the zoning approach." Any decision by this Court on these questions will vitally effect

the constitutional interests of MPAA's member companies, as well as all other producers, distributors and exhibitor of motion pictures in the United States.

Because MPAA believes that the issues raised in these cases are of vital concern to the entire motion picture industry, including its member companies, it respectfully moves for leave to file as *amicus curiae* the Brief appended hereto.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-312

COLEMAN A. YOUNG,
Mayor of the City of Detroit, *et al.*,

Petitioners,

v.

AMERICAN MINI THEATRES, INC. and
PUSSY CAT THEATRES OF MICHIGAN, INC.,

Respondents.

COLEMAN A. YOUNG,
Mayor of the City of Detroit, *et al.*,

Petitioners,

v.

NORTOWN THEATRE, INC.,

Respondent.

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *Amicus* is set forth in the Motion for Leave to File this Brief, *supra*.

ARGUMENT

The Detroit ordinance's definition of the "adult" motion picture threatres to which it applies is constitutionally overinclusive in some respects and constitutionally underinclusive in others, and is therefore invalid on its face.

These cases present for consideration by this Court yet another facet of a field of law which the late Justice Harlan accurately characterized as "intractable." *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 704 (1968) (concurring and dissenting opinion).

At issue here is one of a few recent measures which limit, in various ways, the locales in which certain kinds of non-obscene motion pictures, books and other forms of communication may be exhibited or sold. Such measures, commonly referred to in the generic sense as "the zoning approach," are *not* predicated upon traditional, content-neutral zoning considerations. Nor do they deal narrowly with those specific instances in which minors or unwilling adults are exposed to the content of the material itself. Cf. *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Redrup* v. *New York*, 386 U.S. 767, 769 (1967) (*per curiam*). Rather, such measures are predicated upon assumptions that, for various reasons, the presence of motion picture theatres and bookstores offering certain kinds of non-obscene material should be prohibited in certain otherwise appropriate locales.

In 1972, through a series of amendments to existing zoning provisions, the City of Detroit included "Adult Book Store[s]," "Adult Motion Picture Theater[s]" and "Adult Mini Motion Picture Theater[s]" in a category called "Regulated Uses," no more than two of which uses may be located within 1,000 feet of each other. This category also includes establishments in which alcoholic beverages are sold for consumption on the premises (e.g., restaurants and bars), hotels and motels, pawnshops, pool halls, public lodging houses, shoeshine parlors and "taxi" dance halls.

An "Adult Motion Picture Theater" is defined as "[a]n enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas'... for observation by patrons therein."[1]

The term "Specified Sexual Activities" is defined to mean:

> "1. Human Genitals in a state of sexual stimulation or arousal;
>
> "2. Acts of human masturbation, sexual intercourse or sodomy;
>
> "3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast."[2]

The term "Specified Anatomical Areas" is defined to mean:

> "1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
>
> "2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."[3]

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[1] Petition for Certiorari, Appendix G, page 66. (The terms "Adult Book Store" and "Adult Mini Motion Picture Theater" are similarly defined. For the sake of simplicity, we have referred in the text of this Brief only to adult motion picture theatres; however, our use of this terminology should be understood to include adult bookstores and adult "mini" motion picture theatres as well.)

[2] *Ibid.*

[3] *Id.* at 66-67.

In these actions challenging on its face the constitutionality of the provision which included adult motion picture theatres among the "Regulated Uses" whose locations in the City of Detroit are limited, the District Court upheld the provision, *Nortown Theatre Incorporated* v. *Gribbs,* 373 F.Supp. 363 (E.D.Mich. 1974),[4] but the Court of Appeals invalidated it. *American Mini Theatres, Inc.* v. *Gribbs,* 518 F.2d 1014 (6th Cir. 1975). As the Court of Appeals noted, "this ordinance selects for special treatment particular business enterprises which fall within the general business classifications permissible under zoning laws and classifies them as regulated uses solely by reference to the content of the constitutionally protected materials which they purvey to the public." 518 F.2d at 1020.

MPAA believes that the judgment of the Court of Appeals should be affirmed. We are of course mindful of the

[4] The District Court did, however, invalidate a separate provision which prohibited the establishment of adult bookstores, adult motion picture theatres, adult "mini" motion picture theatres and certain kinds of cabarets "within 500 feet of any building containing a residential, dwelling or rooming unit." The District Court's decision with respect to this provision was not appealed. (See Brief of Petitioners, page 10.)

Following the District Court's ruling, the 500-foot provision was amended to prohibit the establishment of adult bookstores, adult motion picture theatres, adult "mini" motion picture theatres and certain kinds of cabarets "within 500 feet of a Residentially Zoned District." (See Petition for Certiorari, Appendix I, page 87.) We note, somewhat curiously, that Petitioners have asked this Court to pass on the constitutionality of the 500-foot provision, as amended. (See Brief of Petitioners, page 63.) The amended provision did not exist when these cases were commenced, was not before either of the courts below, and of course is not properly before this Court.

However, the same definitions of "Adult Book Store," "Adult Motion Picture Theater" and "Adult Mini Motion Picture Theater" apply to the 1,000-foot provision and to the 500-foot provision, both in its original form and as amended. Accordingly, any decision by this Court with respect to these definitions will clearly have an effect on the 500-foot provision, as amended, even though it is not before the Court as such.

fact that governments possess broad zoning power, *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974), and that it was pursuant to this power that the City of Detroit adopted the provision which is under review here. Nevertheless, a government's exercise of the zoning power is still "[s]ubject to specific constitutional limitations." *Berman* v. *Parker,* 348 U.S. 26, 32 (1954). It is MPAA's view in these cases that, considering the interests which Detroit has advanced in support of the 1,000-foot provision, the ordinance's definition of the "adult" motion picture theatres to which it applies "is fatally overinclusive in some respects and fatally underinclusive in others." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 218 (1975) (concurring opinion of Douglas, J.).

Although "the zoning approach" to content control has received considerable public attention,[5] there are very few extant examples of such measures. Besides Detroit, the City of Dallas prohibits "adult" motion picture theatres, or the exhibition of individual "adult" motion pictures, within 1,000 feet of any church, school or residential district;[6] the City of Boston confines "adult" bookstores and

[5] See, e.g., "Islip is Planning to Establish An 'Adult-Entertainment Zone'," *The New York Times,* October 16, 1975, page 1, columns 1-2; page 29, columns 1-4; "Islip Drops Plan for Pornography Zone," *The New York Times,* October 20, 1975, page 1, columns 2-4; page 18, columns 4-5.

[6] Dallas City Code § 46-9.2 makes it unlawful to operate "as an adult moving picture theatre or adult moving picture show, any moving picture theatre or moving picture show within 1,000 feet of a church or a public or private school accredited by the State of Texas or by a nationally recognized accrediting agency designated by the United States Office of Education or within 1,000 feet of a district zoned for residential use under the Comprehensive General Zoning Ordinance of the City of Dallas. 'Adult moving picture theatre' for purposes of this article means any moving picture theatre which excludes minors by reason of age without regard to whether such minors are accompanied by parent, guardian, husband or wife. 'Adult moving picture show' for purposes of this article means any moving picture

entertainment establishments to a special "Adult Entertainment District";[7] and Fairfax County, Virginia, employs a slightly varied combination of the Detroit and Dallas approaches.[8] Thus, three altogether separate and distinct types of *geographic* limitations have already emerged as facets of the zoning approach: anti-"clustering" (Detroit), anti-"proximity" (Dallas) and confine-

show which excludes minors by reason of age without regard to whether such minors are accompanied by parent, guardian, husband or wife. 'Minor' for purposes of this article means a person younger than 17 years." (Section 46-9.2 was added to the Dallas City Code by Dallas City Ordinance No. 14834, which was adopted on March 10, 1975, and became effective immediately.)

Copies of the Dallas ordinance discussed in this footnote and the Boston and Fairfax County ordinances discussed in footnotes 7 and 8, *infra*, are being filed with the Clerk of this Court simultaneously with the filing of this Brief, and are also being furnished to counsel of record for the parties to these cases simultaneously with the service of this Brief.

[7] Boston Zoning Code, Amendment No. 38, and Zoning Districts—City of Boston, Map 1—Boston Proper, Amendment No. 130, create an "Adult Entertainment District" and confine all new "adult" bookstores and entertainment establishments, including motion picture theatres, to this District. An "adult" bookstore or entertainment establishment is one which "customarily . . . exclude[s] any minor by reason of age as a prevailing practice." (The amendments creating the "Adult Entertainment District" were adopted by the Zoning Commission of the City of Boston on November 14, 1974, were approved by the Mayor on November 27, 1974, and became effective on the latter date.)

[8] On December 15, 1975, the Board of Supervisors of Fairfax County, Virginia, adopted an "emergency amendment" to the County's zoning code under which "Adult Book Store[s]" and "Adult Mini Motion Picture Theatre[s]" may not be established so as to abut residentially zoned or residentially used property, or within 1,000 feet of any church or school. In addition, no two such "adult" bookstores or theatres may be located within 1,000 feet of each other. The Fairfax County ordinance defines "adult" in essentially the same manner as the Detroit ordinance under review in the instant cases.

ment (Boston). This is a nascent area, moreover, in which there is very little case law.[9]

Accordingly, it is our view that it would be premature for this Court to rule on the constitutional propriety of one or more of the above types of *geographic* limitations "un-

[9] Besides the instant cases, we are aware of only two others which have considered the zoning approach to content control.

In *Sanders* v. *State*, 231 Ga. 608, 203 S.E.2d 153 (1974), the Supreme Court of Georgia held unconstitutional a state statute and a DeKalb County, Georgia, ordinance which prohibited the operation of "adult" bookstores or motion picture theatres "within 200 yards of any church, church book store, public park, public housing project, hospital, school (public or private), college, recreation center or private residence." The statute and ordinance defined "adult bookstore" to mean "any comercial establishment in which is offered for sale any book or publication, film or other medium which depicts nudity or sexual conduct." They defined "adult movie house" to mean "any movie theater which on a regular, continuing basis shows films rated X by the Motion Picture Coding Association of America [sic], or any movie theater which presents for public viewing on a regular, continuing basis so-called 'adult films' depicting sexual conduct." (The terms "sexual conduct" and "nudity" were further defined, but the reach of the statute and ordinance clearly was not limited to obscenity.)

The same Georgia statute and a separate but apparently identical local ordinance were involved in *106 Forsyth Corporation* v. *Bishop*, 362 F.Supp. 1389 (M.D.Ga. 1972), *affirmed per curiam*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044 (1975). The District Court upheld the statute and ordinance (362 F.Supp. at 1392-1393), but the Court of Appeals expressed "no opinion" as to their constitutionality (482 F.2d at 281). The only question presented to this Court by the Petition for Certiorari (see page 2 thereof) was the constitutional permissibility of license revocation as a sanction in the First Amendment area. Of course, the District Court's decision in *Bishop* preceded the Supreme Court of Georgia's contrary decision in *Sanders* v. *State*, *supra*.

See also: *Kay* v. *White*, 286 F.Supp. 684 (E.D.La. 1968), holding unconstitutional a licensing ordinance which had been enforced in accordance with a municipal policy that "no movie house [shall] be given a permit where only adult films are shown and minors [are] denied admittance, this being discriminating [sic] and against public policy and good morals." Compare *Butler* v. *Michigan*, 352 U.S. 380 (1957).

der all circumstances and in the face of all kinds of regulation." *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975). For example, a case in which government allowed but limited to certain locales the exhibition or sale of material which it could otherwise suppress completely, *Miller* v. *California*, 413 U.S. 15 (1973), would present constitutional considerations altogether different from those involved in the instant cases.

The Detroit ordinance under review here is hardly a model of clarity. A definition such as "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' " leaves considerable room for doubt as to exactly which motion pictures it applies. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). Moreover, it is unclear from the ordinance whether a motion picture theatre becomes "adult" if it shows only one film of the defined type during the course of a year, or whether it becomes "adult" only if it shows such films on a "regular" basis.

Nevertheless, however unclear the ordinance may be in certain particulars, this is not a case which calls for abstention. Cf. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). The ordinance is clearly intended to and does in fact apply to non-obscene material.[10] In this circumstance, there is no foreseeable state court construction which could obviate "the need for a federal constitutional ruling or otherwise significantly modify the federal claim."

[10] As Petitioners themselves put it: "Obscenity is not an issue in the case at bar. The dissemination of 'obscene' or 'pornographic' material may be, and is now totally prohibited in the City of Detroit. . . . In December of 1974 the City adopted an ordinance prohibiting pornography, based on the *Miller* guidelines." (Brief of Petitioners, page 22.)

Harris County Commissioners Court v. *Moore*, 420 U.S. 77, 84 (1975).

The effect of the Detroit ordinance on the exhibition of constitutionally protected motion pictures is anything but incidental.[11] Thus, if a motion picture theatre is located within 1,000 feet of two other "Regulated Uses" (e.g., a restaurant and a hotel), that theatre may not show non-obscene films which the ordinance defines as "adult." The Detroit ordinance will also effect the exhibition of constitutionally protected motion pictures in so-called "multi-screen units" (i.e., buildings which include two or more separate auditoria for the showing of films).[12] The question here is therefore not what Detroit alone may do, because "what [Detroit] may constitutionally do, so may other cities and States." *Interstate Circuit* v. *Dallas*, *supra*, at 684.

According to Petitioners, the ordinance under review here was adopted for "the sole purpose . . . of preserving the stability of neighborhoods."[13] Although it is difficult to pinpoint each and every separate interest which the City

[11] This Court's decision in *United States* v. *O'Brien*, 391 U.S. 367 (1968), is in any case completely inapposite here. *O'Brien* involved a criminal statute prohibiting certain conduct which may, in some situations, have had the effect of also *indirectly*, incidentally limiting speech. See also: *Konigsberg* v. *State Bar*, 366 U.S. 36, 50 (1961). By contrast, the Detroit ordinance under review here, however its purposes are characterized, *directly* prohibits certain speech.

Nor is this a case involving a reasonable regulation of "time, place, and manner," for the Detroit ordinance clearly is *not* "applicable to all speech irrespective of content." *Erznoznik* v. *City of Jacksonville*, *supra*, at 209.

[12] MPAA's Research Department estimates that there are about 15,000 commercial motion picture theatres in operation in the United States today. Of these, approximately 3,200 are included within multi-screen units—"duplexes," "triplexes," "quadraplexes," etc.

[13] Brief of Petitioners, page 11.

has advanced in support of the 1,000-foot provision, two general themes would appear to be fairly clear.

First, Petitioners contend that the ordinance was "enacted in response to complaints from residents and businessmen that the influx of 'adult' businesses in the City of Detroit was adversely affecting the surrounding business and residential districts, decreasing property values, driving away residents and businessmen, causing increase in crime, particularly prostitution, causing neighborhood decline and the resulting lack of neighborhood pride, and generally detracting from the 'quality of life' necessary to maintain a viable neighborhood." [14]

Second, Petitioners contend that the "Regulated Uses" category, in which adult motion picture theatres are included by the ordinance, is designed to prevent "the concentration of similar types of businesses which [are] not oriented to serve the needs of the immediate neighborhood, but primarily attract[ ] persons from without the surrounding community who [have] little or no concern for the maintenance of a viable neighborhood." [15]

Clearly, both of these general themes include constitutionally cognizable interests of government. *Village of Belle Terre* v. *Boraas, supra.* Nevertheless, in the instant cases the Detroit ordinance's definition of the "adult" motion picture theatres to which it applies is constitutionally overinclusive with respect to the first general interest and constitutionally underinclusive with respect to the second.

Overinclusiveness. The term "adult," standing alone, means different things to different people. The numerous uses of this term throughout the Record in these cases are wholly undifferentiated. See *Tinker* v. *Des Moines School*

[14] *Id.* at 8.

[15] *Id.* at 17.

District, 393 U.S. 503, 508 (1969). Indeed, many of the affidavits and letters introduced by the City in support of the 1,000-foot provision refer to establishments offering "pornography," [16] a category far more limited in scope than the material which the Detroit ordinance defines as "adult."

The ordinance under review here operates in an area in which "precision of drafting and clarity of purpose are essential." *Erznoznik* v. *City of Jacksonville, supra,* at 217-218. Yet, on the basis of the Record in these cases, any connection between the deleterious effects which the City is trying to prevent and the exhibition of those constitutionally protected films which the ordinance defines as "adult" is simply "too remote and conjectural to override the guarantee of the First Amendment." *DeGregory* v. *Attorney General of New Hampshire,* 383 U.S. 825, 830 (1966).

The suitability of a neighborhood environment for family life is of course a legitimate interest of government, but this Court has long since held that public areas cannot, consistently with the First Amendment, be sanitized to the point where they are "palatable to the most squeamish among us." *Cohen* v. *California,* 403 U.S. 15, 25 (1971).[17] We cannot and do not quarrel with Detroit's desire to promote and protect an environment suitable for family life—a desire with which we fully agree. However, we can and do quarrel with the City's attempt to achieve that goal "by

[16] See Brief of Petitioners, Appendix J, pages 22-23, 26, 30-31.

[17] The definition of "adult" under review here is based solely on the content of films shown *inside* enclosed motion picture theatres. The exterior facets of *all* motion picture theatres (marquees, billboards, and the like) "properly may be put in a class by themselves." *St. Louis Poster Advertising Co.* v. *City of St. Louis,* 249 U.S. 269, 274 (1919).

means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964).

Underinclusiveness. The purpose of the "Regulated Uses" category is to prevent the "clustering" of business establishments in excess of those required "to serve the needs of the immediate neighborhood."[18] To the extent that motion picture theatres may properly be included among "Regulated Uses," it would appear that the underlying rationale of this category applies to such theatres irrespective of the content of the non-obscene films which they exhibit. Certainly, on the basis of the Record in these cases, there are no "clear reasons" for the distinction which the ordinance draws between various types of constitutionally protected motion pictures. *Erznoznik* v. *City of Jacksonville*, *supra*, at 215. We can therefore only conclude that the designation of adult motion picture theatres alone as "Regulated Uses" is "strikingly underinclusive." *Id.* at 214. See also: *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

In sum, like the drive-in theatre ordinance which this Court invalidated in *Erznoznik*, the Detroit ordinance under review in the instant cases is obviously well-intentioned. But this is not enough. Considering the interests which the City has advanced in support of the 1,000-foot provision, it is our view that the ordinance's definition of the "adult" motion picture theatres to which it applies is constitutionally overinclusive in some respects and constitutionally underinclusive in others. The ordinance is therefore invalid on its face.

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[18] Brief of Petitioners, page 17.

Conclusion

For the reasons set forth above, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served three copies each of this Motion for Leave to File Brief *Amicus Curiae* and Brief of Motion Picture Association of America, Inc. as *Amicus Curiae* upon counsel of record for each of the parties by depositing copies of said Motion and Brief in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery first class.

Copies of this Motion and Brief were sent to the following:

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This ..... day of January, 1976.

.....

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